4 MACHINET B

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PITKIN*

STATE OF COLORADO

Criminal Action No. C-1616

MEMORANDUM OPINION	AND	ORDER	(Re: Motion to Strike the Death	Penalty From Consideration)	
			, , ·		
) Plaintiff,			JNDY,	Defendant.
THE PEOPLE OF THE STATE OF COLORADO,			vs.	THEODORE ROBERT BUNDY,	

Dumas, Jr., a deputy district Ninth Judicial District for the purpose of this case. advisory The motion was The People were punishment pursuant to the Eighth and Fourteenth Amendments Deputy District Attorney Milton Blakey, Esq. of the Strike the Death Penalty from Consideration in this case on numerous acting as assisted by James F. to grounds, including violation of the prohibition of cruel a Motion Constitution of the United States of America. Judicial District, who had been appointed as 23, 1977, the time was On May 16, 1977, the defendant filed and again on June was at. and Chief Deputy Public Defender, who Defendant represented himself for the defendant, 7, 1977 attorney in the represented by on June counsel

The Court has considered the motion and argument the basis on and, by counsel issues the following opinion and order. and the briefs filed counsel

degree Colorado, pursuant crime of the The defendant is charged with murder under the laws of the State of statute which provides:

first with the the degree. in deliberation and of murder the first the crime commits the crif: (a) After of "18-3-102. degree

(1973), or other that person 18-3-102 (19 person of ಥ C.R.S. death of death the the person; causes cause he another amended to of as

PΙ felony. one class B is degree first the in Murder

thi or to to That death jury appendix separate amended to trial sentenced d the felony, the as in before • full (1973)þe one in should conducted class 16-11-103 forth defendant a set of be . conviction C.R.S is to and the is hearing lengthy imprisonment. whether Upon is sentencing determine statute opinion life

Fourteenth nodn constitute enalty and Eighth d would death States the charged the of United impose in violation is he the to which that Constitution of with contends punishment crime Defendant the the unusual to of conviction Amendments and cruel

(1976)procedures punishment sentenc recent S.Ct. may 2909 -1 punishment 92 punishment in the the Ct. 238, and unusual Court I£ that S S 96 Supreme the Ø risk sense determine whether 408 capriciously, cruel substantial Amendment States Georgia Ś is n it United 5 Eighth excessive, or d Georgia, Furman create to arbitrarily supra of the in the guidelines sentence unusual. Georgia, is > Decisions Gregg unusual punishment imposed provide and (1972); imposing > and Gregg cruel pe the years cruel will 2726 for See þe ΙĘ

severity Georgia, Ø (1977)the gros involv > Gregg to 2861 is proportion it it S.Ct. See either because because 97 crime, of • or out pain the woman excessive U.S grossly of of severity wanton infliction adult to be Georgia, be an may the was held of rape Punishment proportion to > Coker of or sentence crime unnecessary In of the supra。 death out of

-uslund and unusual cruel of prohibition Amendment Eighth The

progress 90, of the Dulles S °Ct. is its standard conclusive the S which draw mark 78 > supra Trop must 86 of man that not .Ct perceptions s Georgia "(t)he Amendment of S Amendment. are decency 1 96 356 dignity of sanctions Dulles, Þ 2925 of Gregg public 'the Eighth standards ф, > criminal with at cited in that Trop theconcept. Georgia, accord evolving clear underlying to society." static U.S. respect make SO > al 356 the Gregg also must concept d maturing from with of not 101 cases penalty decency S meaning -1 'basic ь. d ment o£ V

> offense supra; Jurek supra penal Florida, an • • and (916) S -1 cruel death Georgia Murder 2960 > the constitute Proffitt S,Ct > (1976)Gregg circumstances 96 supra; not 2950 circumstances does S.Ct. Georgia, S appropriate n penalty 96 > supra all death Florida Gregg under under U.S Texas The which, punishment > imposed Proffitt >1 Jurek Texas for be

to plurality 18 S penalty 1 the are the of offense death record Carolina by stated the the and of whether North character iscircumstances it Woodson v. deciding case, the that of of the required, In consideration process and .Ct: (1976)offender S the tutionally 96 2978 of In ed, 2991 individual ct. impos consti S d þe 96

policy 100 sentencing U.S., at 100 consideratio underlyi constituti and offender enlightened inflicting believe for humanity individualizing Ø 356 as requires individual We offense Dulles, o F simply imperative, the process respect e particular of the record of the i reflects of Tropp fundamental practice constitutional (plurality sce generally theindispensable part ty of death." Eighth Amendment, and of prevailing the the circumstances at 597 character determinations cases than a the S.Ct. capital penalty the rather While 78 of

the and degree of homicide record first is offense for and and premeditated mandatory character the of death penalty the circumstances deliberate to regard the the any without or statute making included offender murder, which felony individual a • murder

ò procedures murder, >1 of Stanislaus Roberts Roberts Roberts death even where category duties peace the intent degree if which Washington sentencing of Even Harry In Harry fireman or lawful narrow and record specific first And for supra is unconstitutional. performance of his the the crimes of (1977); the S.Ct. 3001 (1976) (1976)° the offense, ಥ a categories Carolina, statute relates to character a human being when the offender has exists if bodily harm upon, S.Ct. 1993 3214 S.Ct. limits North do not permit consideration of the to narrowly drawn S.Ct. and the circumstances of 16 constitutional infirmity statute was engaged in the of penalty 96 16 Woodson v. 96 1995 inflict great death penalty 906 death penalty the at p. u.s. u.s. n.s of unconstitutional, imposed said, 428 imposition or to who mandatory Louisiana, Louisiana, Court Louisiana, mandatory same offender be officer killing to the the

regarded interest peace incorrect of provided examples prior extreme the exist a who victim was Circumstances of pe special guard any of it is servants ct are all exthe killing can regular duties may or believed existence in of to t, the influence of drugs, alcoholdisturbance, and even the existent no mitigating circumstances is a police officer. Circum But ಥ ing facts which might attend the ki and which are considered relevant absence that the murder is order e public in order reasonably his conduct There and property. the these lives circumstance, justification for his offender, his to offender their fact performing safety of other persons affording protection thethe riskthe aggravated sure, that victim youth of regularly must stances which officer conviction, igating suppose pe emotional when the 11 the an peace

unconstitutional, consideration of to its is essential allow consideration offense. relevant repeatedly in Roberts* and last term, it is essentia for particular be is l last term, it decision allow factors, it whatever mitigating circumstances may the particular offender or the tonic. particularized mitigating emphasized statute Louisiana We the

said: all where it is individual it jury have before about the individ S.Ct., 2958 of 96 the information that v. Texas, supra, at p. essential is is "What Jurek See

relevant

possible

supra. *Stanislaus Roberts v. Louisiana,

law Texas 0 wi.11 evidence determine such must all it that fate assures whose defendant adduced. clearly

constituleft Harry person р situation at pass supra and ಥ law" by 2, might Louisiana, killing d d footnote such such penalty that justify intentional 1995, > death suggested Harry Roberts may ď mandatory that at nodn Ct It supra, problem s. where based sentence 97 in d ana, whether of Court unique 5, Si Loui life footnote muster question = d presents serving 1996

statutes, S Texa penalt circumstance Jurek penalty death certain supra; death mitigating mandatory Florida, of constitutionality consideration of ٧. the Proffitt down striking the permitted supra; upheld Although Georgia, which has Court statutes > Gregg supra

circumstances The and and of individually statutes Constitution scope of οĒ mitigating the determination and Texas purpose them. determining considered States to the of Florida compared United evidence and for in þe circumstances instructive will statutes the Georgia, pe. which by then states are mandated for those the w111 are three mitigating purposes under under statute penalty these received procedures which The Colorado of of appropriate evidence evidence statutes be may the the

Florida

with trial which bifurcated jury same the d for before provides place statute take to The Florida stage guilt sentencing determined

circumstances, aggravating circumstances: eight contains mitigating statute seven Florida following The the and

prior of significant history ou has defendant activity. The "(a) criminal

defendant emotional the while Or committed mental extreme felony was of influence capital the disturbance. under

defendant's in the participant act. the Ø was to victim consented The or <u>်</u> conduct

and his participation the in accomplice person an was another defendant minor. committed The relatively (p) felony

duress or under extreme acted under defendant the substantial The (e)

the to appreciate conduct substantially impaired. another person to defendant thedomination of of conduct capacity his condu law was requirements of The of criminality

cited statutes, cir time of the supra, Florida at the age of the defendant at (Supp. 1976-1977), Floor of Proffitt v. Florida, 921.141(6) The 9 in Footnote 96 S.Ct. (8) S.Ct.

outweigh State, include aggravating Florida, Florida, Proffitt v. on these and convincing certain legislatively specified aggravating sentence is imposed, the trial court must stage, "Evidence may be presented jury determination (Conclusion circumstances in imposing > sufficient mitigating circumstances exist...which sentenced to insufficient statutory sentencing and must Tedder court must then and...(b) ased statutory recommendation of life to in 1975), quoted in Proffitt States Supreme Court in Proffitt jury is directed In order quoted virtually no reasonable person could differ," so clear and mitigating circumstances." (Emphasis added). considerations, whether the defendant should be sufficient The statute, aggravating circumstances found to exist; advisory only. should be trial relevant to S.Ct. are aggravating and mitigating The Florida The that there 96 jury 96 S.Ct.) sentence of death of S.Ct. fact sentencing circumstances exist and that So.2d 908, 910 (Florida; deems 2965 Ø vote and is or death." following written findings of 96 at p。 matter the judge the United p. 2964 of death relating to 2965 of the supra, Ø is by majority (imprisonment) sentence At ΙĘ suggesting a b° "(w)hether at stated by at statutory sentence。 matters Florida, supra, supra, that make

aggravating circumstances, statute citing the Florida outweigh the mitigating circumstances to supra, v. Florida,

determin are p. 2966 would the consideration results in the d that virtually no reasonable person could those aggravating the court court can impose of death the by statutory evidence of mitigation questions posed circumstances of at the trial judge in such as positive contributions there circumstances. circumstances)...the to appears that supra, pe factors not limited sentence statutory lists, sentence after the jury had recommended death; i.e., relevant to any of the mitigating circumstances on the defendant to his family or community, which would not statutory Florida, the trial it suggesting a circumstances against the statutory mitigating questions (the individual statute, judge's function is to weigh the to consideration or use by Proffitt v. and mitigating some types of Notwithstanding this limitation to the imprisonment, such of mitigating Florida on the facts if "To answer these types of mitigating evidence, and that each defendant." the sentencing judge must focus the the statutory aggravating appears that convincing of life sentence only if evidence under list Thus, recommendation subject concluded that statutory consider and It homicide and S.Ct. so clear þe death 96

Georgia:

with trial, statute provides for a bifurcated jury same the stage take place before sentencing the to The Georgia AL stage determined guilt. sentencing

of and aggravation supra, pleas any prior absence additional Georgia, or the guilty shall hear or mitigation, record ° > of the defendant, d pleas., Gregg pleas the jury)* extenuation, including and conviction and quoted convictions (or of statute, judge contendere punishment, in "Theprior evidence criminal

stage. the guilt trier of fact at , e.,

recommendation aggravating circumstances circumstances otherwise quoted to consider of beyond death death one and the scope accorded substantial statute, Gregg is if jury must specify the exist is aggravating or mitigating circumstances The only jury imposes a binding its recommendation to impose introduce, jury is the guilt stage. found to Georgia imposed S.Ct. the 96 aggravating jury then elects evidence he may statutory sentence may be circumstances is evidence..." of The sentence, is 2921 the defendant adduced at supra。 circumstances found if b. (10)or The determining at the circumstances Georgia, of supra, reasonable doubt and the of and the death delineated in the statute. aggravating supported by authorized by law and any evidence types law, Georgia, Gregg V. In the case the nonstatutory may consider the "any mitigating supra. to statutory pe Georgia sentence, aggravating > as sentence. which may Gregg Georgia, latitude Under the in

exas

of types five specific to homicides Texas limits capital serious homicides. especially

following trial, with evidence which the sentencing stage, any relevant jury answer a bifurcated the same to required take place before statute provides for then is jury the to At The stage Texas guilt. three questions: produced. sentencing The determined may be the

deliberatel defenda death of the defendant that the committed that the Was expectation conduct of result; deceased would the reasonable the of another Whether death the Or the"(1) with deceased caused

constitu that would a probability that of violence that wou and society; is acts there to commit criminal threat Whether continuing (7)would

2955 whether the conduct was unreasonable in the deceased." supra, Texas, by evidence, deceased any, > ĹÉ in Jurek the the provocation, the in killing by quoted If raised statute, defendant response to (3) the

which legitimately sentencing one question to The although manner and þe or record asked to bring to the jury's attention whatever mitigating reasonable The the answer It may the would have no logical relevance, the answer of remorse, conduct. I£ of mitigating circumstances which are put to the jurors at the S to be any jury could criminal allow Thi imprisonment. circumstances which, the results. in supra jury hearing. Ø evidence relevant to predicting future ΙĘ to circumstances establishing beyond relevance, in determining lack second question to show, including the yes. question whether the penalty Texas, the life age, duress, mental or emotional pressure, the Texas law permits is of Jurek v. each question sentence is death of mitigating outcome are types of mitigating the the Court, to consider whatever evidence of circumstances he may be able before it. law, the questions is yes, construed the burden answers is no, the Ø to on the admissible under Texas questions limited logical there is such types answer Court concluded that effect discussed by can bring courts have People have the Thus, an three psychiatric "consider" that that there have defendant three defense the not the highly stage. would

of the Ci types aggravating much the serve narrowing of to of list types ದ serious with the the jury considered especially as providing Court five The to homicides function

Colorado:

either forth information trial presented by jury set relevant to any of the aggravating or mitigating factors bifurcated same , any before the ...may be = • ಡ At the sentencing hearing, for place statute provides statute) sentencing stage to take the of Colorado section determined guilt. (another The the with

each mitigating imprisonment the verdict conform court must aggravating finding relatively minor of The that existence or nonexistence relates to create (1973). (2)exists and of statutory OL ΙĘ life the combination statutory conduct eighth conduct would cause or (2) age of statutory aggravating factors exists, statutory mitigating and aggravating factors. 16-11-103(2) of and factors The penalty duress, (4) the of eight theanother the offense; defendant to death. Any other wrongfulness imprisonment. under statutory mitigating ಭ C.R.S. the a crime involving offense committed by verdict as to the Seven of law, (3) (1) (1973)defendant..." appreciate his of life summarized as: the nature C.R.S. 16-11-103 of that another。 to requirements sentence foresee for that none of the to Ø the in focus on conviction to jury must render capacity the may be people or to death participation sentence the ø of in to reasonably death. more of conduct of factors factors the prior of or

which offender experienced, lack In circumcrime, or the of р. individual record family of holding the process and at factors the time of the or an plurality being under the of defendant's personal background past contributions to and background have no Defendant's criminal character and record of the Whether defendant is just 18 and other supra, in the course indispensable part of the by at thereof said statute, condition was His lack relevance. character Colorado it mental Carolina, his remorse or thereof has no relevance. death, constitutionally the Under the other than adult has no defendant's considered. only aspect penalty of consideration of North S.Ct: . community, stances, the d reflect Woodson the can be be to

relevant to significance no accords that process

or mitigating humankind. offense offense members to individual ultimate subjected designated particular as of of compassionate but frailties the the death. beings, be of firing the of a to record of diverse undifferentiated mass of individual human convicted penalty in circumstances possibility and consideration the the character from persons faceless, undillering ind infliction of the stemming the as uniquely from death a11 or treats offender excludes of factors blind not

defensuggesting Direct use mitigating at answers sentencing determination The narrow scope of mitigating evidence individual prescribed da of arrive Florida convincing that virtually allow the to the Flori to develop facets an advisory determinative jury S facts •H of to plan that The evidence of case, the a uniquely side factors Texas evidence of all theto juries in Colorado at of sentencing or life imprisonment. capital of a marked contrast from the other part Texas which the Direct use can find in turn being the face being have no relevance to the mitigating that many mitigating circumstances necessary of important defendant as and d latitude in introduction in statutory jury uses standards imprisonment unless it Georgia by death penalty in and stage jury. the process an Viewed clear differ. answers case presents is sentencing the Colorado's Florida, Georgia theconstitutional of death jury SO available character and record of and Texas patterns. reasonable person could In Florida, such to be the of the summary, rd the part sentence questions, evidence by death impose sentence by in Colorado, capital at which is substantial life satisfy important circumstances of sentence. courts cannot advisory sentence of sentence ಡ statutory evidence ij to that Georgia law an stage coin, rigid by

constitutional range conbroad of the possibility d pe o£ introduction presumed to Consideration has been given to is permit statute the Colorado statute to The evidence. of mitigating

supra its unconstitutionalit factor (1972)the statutory pattern and would constitute impermissible ф S a11 The Prante, factors would mitigating There would be no legitimate use to It also would evidence to construe the statute to permit consideration and use of mitigating 1083 at could put evidence in mitigation not relevant factors. Roberts <u>.</u> P.2d See People v. constitutionality > of See Woodson these authorizing presentation aggravating Stanislaus 493 statutory mitigating enactment. 243, found unconstitutional only if of Any attempt to determine whether any Colo. doubt. S.Ct.; nullification. and S.Ct. the legislative its 177 statutory mitigating of 96 reasonable of 96 preserve the statutory mitigating factors. Prante, or aggravating factors exist. 3007 not relevant to the 2990 explicit in jury to People v. at p. established beyond a р. of construed invite impermissible at jury's function is amendment supra, supra, be jury See statute is on the can to þe Louisiana, which the statute possible. Colorado evidence violence judicial must The 1.5

and Fourteenth Amendments offense imposition Whether and cruel the America. the for constitute that statute of concluded Eighth States charged would Colorado the the United is to in violation of it sentence pursuant is Accordingly, defendant Constitution of punishment which the death the

to unnecessary is standard higher Ø imposes Constitution consider, Colorado

sentencing contends but briefly bases upon which he permissible above, considered expressed Q could not become These will be other conclusion urged the case. Defendant has sentence of his view alternative in death in in detail that the

Factors: Mitigating Statutory of Vagueness

factors 2969 challenge and d at statutory mitigating raised said same Court circumstances was The The applied. supra. the pe that vague to similar mitigating Florida, contends 100 Proffitt v. are Defendant age, strikingly in S.Ct: for rejected 96 to οĘ

hard, commonly þe may is == decisions than lawsuit line-drawing ø and in questions finder more fact these ou ದ require of "While required

.Ct the S 96 guide of 2957 to ď standards at supra, objective Texas, to provide > Jurek Failure

death

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stated availability in mitigation, Supreme respect which directed unnecessarily depraved substituted for "depraved", similar factor separately factor seems States with be or the to d standards the final considered above, aggravating cruel is evidence Florida has United standard objections to which and other objections the offense in an especially heinous, the crime is failure to provide objective appellate review, limitation of the only construed, be vague (1973).construed pitiless The defendant imports argument, that "atrocious" is contended to factors. 16-11-103(6)(i) SO has OL proof As vagueness conscienceless Court victim, statutory mitigating burden of þe The Florida Supreme **a**s C.R.S. the could except the Except of allocation of of to argument of the reasonably variant torturous committed standard, manner." at ದ

construed, Colorado knowingly Georgia, duty standard SO found the the as cases," defendant Gregg v. in with also d the provision, penultimate aggravating circumstance death to many persons,", capital in Proffitt charged See "the (1973).S.Ct. in that those that sentences The Court 96 standard C.R.S. 16-11-103(6)(h) guidance to cannot say of 2968 imposing impermissibly vague the risk of S°Ct° at p. inadequate Court held that "We 96 or supra, a great 2938 of recommending Florida, provides statute. created to the ď

ilure to provide for appellate review:

authority, and this was considered the Florida system in Proffitt v. Florida, substantial question whether sentencing recommendawhich procedures for assuring proportionality of sentences to be important evaluation and comparison necessary to determine proportionality similar review role on its aggravating of the validity of the procedure for imposing the death penalty of the jury's decision, authority, the Court considered Georgia's elaborate appellate supra, in which the jury had the sentencing availability and stage for proportionality clear. continuing defendant appellate court sentencing appellate degree murder trial in Colorado are not at all and the mitigating that the ಭ In Florida, where they jury makes a nonbinding constitute the the findings at the B to review system, factors in many cases would inhibit the there is As pointed out in the briefs, appellate review a prediction of probabilities statutory supreme court took a that would relevant to Colorado appears that authority the validity of specific appellate review of jury of violence the has given no legislative limited evidence Under initiative without It Texas too Georgia, state sentences, to acts society, the important includes commit Gregg to of

another that imposed to on a for roles necessary sure time infirm ously this OWI to caprici their extent at found adequate guidelines view been the or i, wi.11 to arbitrarily has procedure pansand of statute courts absence þe review be appellate the not determinati the not that wi11 wi11 of appellate view fact Colorado issue penalty definite in the this Colorado and of the death view reason, how ಡ appeal make In to

state compelling drasti d less fulfills a by penalty fulfill death pe the not that could show which to interest Failure

interest the process is government sentence due substantive death compelling the that that d further demonstrate argues to Defendant means state restrictive that

punishment that theand that constitution held was it the supra violate Georgia, invariably > Gregg not does In death Court o£

crime selected least the the to penalty select disproportionate 2926 the to as legislature long 80 or ď possible inhumane the S.Ct. not require penalty poss cruelly inhu involved. .may severe not is

S -1 as it Georgia extent constitutional well $_{\rm by}$ the not prescribed is to defendant's argument, Constitution, death penalty procedure States the the hold under United Thus, to murder on the imposition. went nodn or Court founded its

fundamental onal show constituti to process compelling compelling find attempt analy a as due to fundamental life process and to a d that demonstrate under then proceeds infringement Jo realize due characterization scrutiny ัต substantive of to to Infringement state support the analysis strict means the a restrictive to from the urges The requires subjected to right. interest. Defendant interest proceeds This less constitutional be of must government government analysis. analysis absence right

from murderers available the declaration of imposition means by the peen need society restrictive Massachusetts in the committed to protect has invalidating least analysis the murder interest penalty is not the under Such an Court in of crime rape government attempted Supreme murders. for the death satisfy the Massachusetts death penalty deter an OL the to rape and

analyzed be course, would reasonable construing not such it Supreme Court plurality has Of on reached above, and is unnecessary to embark a analysis in supra. beyond absent the necessity therefor. Georgia, proof such of of the conclusion innocence: Gregg v. adopt concepts States free to It terms, due process of Constitution. presumption The United are such view courts 80 in qo of in Colorado analysis unwise doubt

constitutionaffirmative case the position in their o£ a preponderance in the aggravating factors use Even if this People No of Nothing is perceived of line the required in establishing aggravating circumstances burden element of their case, including negation requiring the penalty Roberts matters by mitigating factors. cited directly in support of this proposition. such a is take brief that they have the burden to establish infirmity Proffitt, Jurek, Woodson, Stanislaus defendant argues from cases beyond a reasonable doubt that The People such stage. eliminating mitigating circumstances at establishing sentencing constitutional of such a requirement. and to negate the existence the can be borne by at evidence, no procedure The every suggests burden of the Ø such is

foregoing Memorandum Opinion, it is the of for imposition statutory procedures Based upon the Colorado the

doubt; the prohibition against cruel and unusual punishreasonable Ø ment under the United States Constitution beyond penalty violate accordingly, IT IS ORDERED THAT the motion to strike the death penalty from consideration in this case be granted. Defendant has moved for a bill of particulars with respect for bill rely; found that the motion aggravating circumstances upon which the People will upon the foregoing order, it is is moot. of particulars

Done this 27 day of

BY THE COURT:

District

Consideration) Order the Death Penalty From and to Memorandum Opinion Strike Bundy to Appendix Page People Motion C-1616

of guilt of a defendant of a class I felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment. The hearing shall be conducted by the trial judge before the trial jury as soon as practicable. If a trial jury was waived or if the defendant pleaded guilty, the hearing shall be conducted before the trial judge. reionies. (1) Upon conviction Imposition of sentence in class 1

aggravating or mitigating factors set forth in subsection (5) or (6) of this section may be presented by either the people or the defendant, subject to the rules governing admission of evidence at criminal trials. The people and the defendant shall be permitted to rebut any evidence received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any of the factors set forth in subsection (5) or (6) of this section.

(3) After hearing all the evidence, the jury shall deliberate and render a chieft, or if there is no jury the judge shall make a finding, as to the existence or nonexistence of each of the factors set forth in subsections (5) and (2) In the sentencing hearing any information relevant

(6) of this section.

(4) If the sentencing hearing results in a verdict of finding that none of the factors set forth in subsection (5) of this section exist and that one of the factors set forth in subsection (6) of this section do exist, the more of the factors set forth in subsection (7) of this section do exist, the sentencing hearing results court shall sentence the defendant to death. If the sentencing hearing results in a verdict or finding that none of the aggravating factors set forth in subsection exist or that one or more of the mitigating factors if the set forth in subsection (5) of this section do exist, the court shall sentence set forth in subsection (5) of this section do exist, the court shall sentence and the verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

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(5) The court shall not impose the sentence of death on the defendant if sentencing hearing results in a verdict or finding that at the time of the

offense:

(a) He was under the age of eighteen; o

(b) His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or
(c) He was under unusual and substantial duress, although not such duress

as to constitute a defense to prosecution; or (d) He was a principal in the offense, which was committed by another. but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

the Death Penalty From Consider Order and to Memorandum Opinion Strike Bundy > to Appendix Page People Motion C-1616 (Re:

Imposition of Sentence

(e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.
(b) If no factor set forth in subsection (5) of this section is present, the court shall sentence the defendant to death if the sentencing hearing results.

in a verdict or finding that:

(a) The defendant has previously been convicted by a court of this or any other state, or of the United States, of an offense for which a sentence of life imprisonment or death was imposed under the laws of this state or could have been imposed under the laws of this state if such offense had occurred

(b) He killed his intended victim or another, at any place within or without the confines of a penal or correctional institution, and such killing occurred subsequent to his conviction of a class 1, 2, or 3 felony and while serving a sentence imposed upon him pursuant thereto; or

(c) He intentionally killed a person he knew to be a peace officer, fireman, or correctional official. The term "peace officer" as used in this section sheriff, undersheriff, or deputy sheriff of a county, state patrol officer, or (d) He intentionally killed a person kidnapped or being held as a hostage by him or by anyone associated with him; or (e) He has been a party to an agreement in furtherance of which a person

(f) He committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device. As used in this paragraph (f), explosive

(I) Dynamite and all other forms of high explosives:

(III) Any explosive bomb, grenade, missile, or similar device; or ing any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or com-

pound, and can be carried or thrown by one individual acting alone; or therance of such or immediate flight therefrom, he intentionally caused the death of a person other than one of the participants; or (h) In the commission of the offense, he knowingly created a grave risk of death to another person in addition to the victim of the offense; or (i) He committed the offense in an especially heinous, cruel, or depraved

Source: Repealed and reenacted, L. 74, p. 252, § 4,

Editor's note: This section became effective January 1, 1975, and applies to offenses occur

N THE DISTRICT COURT
N AND FOR KKKM THE COUNTY OF PITKIN
ND STATE OF COLORADO

Criminal Action Number C-1616

THE PEOPLE OF THE STATE OF COLORADO, Flaintiff

VS.

THEODORE ROBERT BUNDY, Defendant.

Jane of the state of the state

MOTION FOR THE RETURN OF

DEFENDANT'S PERSONAL PROFERTY

DEFENDANT'S

OF

AND DISPOSITION

LEGAL FILES

result 10 the Sheriff' reason Garfield my personal understanding that might have which County the not of of prosecution Garfield does return to me confines it is my Sheriff the the any by the which the Garfield County departure from evidentiary value for 1977, seized seeks 30, cell were escape. This Motion December my my Following my On of contentts of has Jail Department. property believe County

in right the counsel -otion my 40 De Of the knowledge my knowledge this assisted by should have in H counsel паке full that is no misunderstanding about and be いったが I understand 1--statement appointed volunterily silent 10 Any that Constitutional right to remain the right and counsel. thereof state freely me and conseduences private Let there knowingly, silent, this matter, SO afford remian legal made

assume responsibility escape Jail evidfrom that there are should out received al the Carfield County action. virtually no for my escape granted brought me Lohr went They not culpability H the aboutcaptioned after my first privileges burden also. and would. sure Juage had WINO measures is I who must 1 (7) they that those 1977, from CIMO 1-4 the statement since the a case where their securi.ty assure be noted that sense, RO escaped Courthouse in June, Z. Of way facilitated ب احا. some project たり myself broader increased analysis, H designed must assume 30, 1977, in in Utah. representing this 43 Judge Lohr. It should in a trial attempt recommend requests finel make in no but alone December Pitkin County to stand me to the escape, those who will escape was Was me against obliged prosecution 10 H left Н Colorado way because my have for his the 10 が近

Association Sheet Headnotes 23, 1978 Bar Colorado Advance October

DISTRICT COURT PEOPLE V. 27963 No

DISTRICT COURT BROWN V. 28017 No

DISTRICT COURT PEOPLE V. 28049 No

(Interlocutory Appeal) Original Proceeding

(Mitigating Factors) Death Penalty

Penalty Death

(Judge and Jury; Fact Concerning Particular Offense) and

Standards; (Objective

Aggravating Factors)

C.R.S. Penalty Death

Aggravating (§16-11-103, C (1976 Supp.); Factors)

Factors Construction) (Mitigating Penalty Death

Factors; Construction) (Mitigating Death Penalty

1973 C.R.S. (§18-1-409, C.R.S Appellate Review) Death Penalty

death because available Supreme the interlocutory appeal, the Suprissue presented in this case the application of proceeding is not ordinarily Colorado address the issue presented question relating to the app in the of cases pending Although an original promeans for obtaining an i a number threshold penalty in means the Court

the judge from considering as a mitigating factor any ion pertaining to the defendant' character o î£ is unconstitutional offense. information pertaining to the of jury is precluded from consire circumstances record or the

A judge or jury, in considering the death penalty, must allowed to consider all possible relevant information about individual defendant whose fate it must determine.

constitutional, must set out ge or jury to differentiate be-To this end, the legislature from crimes οĘ n penalty statute, to be constitutional, must set sandards to help the judge or jury to differential cases in which the death penalty may be imposed or it which it may not. To this end, the legical which it may not. To this end, the legating factors which justify imposition it may narrow the definitions of the cr of the same purpose. to the penalty, or it may narrow that penalty may imposed aggravating death penalty standards those case in which out objective set which those

jury \$16-11-103 sets out eight aggravating factors to help the termine whether the death penalty should be imposed. The determine whether to

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this enumeration was expresséd no opinion about whether constitutionally sufficient.

judge or be intromay be intro-only be intro the s out five mitigating factors for Although any information relevant such information may on the enumerated factors. factors, to consider. Alth concerning those sets \$16-11-103 jury t duced

death. defendant that concerning the time from introducing mitigaare constitutionally from introducing evidence to s innocence; (3) do not the mitigating facts which red are constitutionally service sentenced Ø allow some to þe render construed should not defendant from the future on his defendant to declared (2) prevent the defendates if he maintains his introduce all mitigating factors or tors (1) limit admissible evidence cannot be a11 which he oint.
Court ha.
rts the de introduce ted States Supreme Court hated; and (4) prevents the show that he has or could ο£ factors by virtue to defendant enumerated circumstances offense; community, the mandated; The factors the United allow the of to

is unconstitutional, from court of the court's ruling that §16-11-103 decide whether §18-1-409 precludes the sentence of death. In view not reviewing a need

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IN THE SUPREME COURT OF

COLORADO

NO. 27963

DOT Petitioner, d repre-E. TUCKER, THE DISTRICT COURT OF THE STATE OF COLORADO, GEORGE E. LOHR, AS ONE OF THE DISTRICT COURT JUDGES OF THE DISTRICT OF by and through STATE COLORADO, by and throu their duly appointed r sentative, FRANK G. E. DISTRICT ATTORNEY, THE OF PEOPLE COURT,

1978

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Respondent.

E. Tucker, District Attorney, Russel, District Attorney, Blakey, Chief Deputy District Attorney, Robert L. Milton K. 9 Robert Frank

Attorneys for Petitioner.

Kenneth Dresner, Kevin O'Reilly, Attorneys for Respondent.

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28017 NO.

Petitioner, NOLAN L. BROWN, DISTRICT ATTORNEY IN AND FOR THE FİRST JUDICIAL DISTRICT, COUNTY OF JEFFERSON, STATE OF COLORADO,

>

AND FOR HONORABLE MICHAEL C. VILLANO, ONE OF THE JUDGES THEREOF, DISTRICT, and THE NI FIRST JUDICIAL COURT STATE OF COLORADO, DISTRICT

Respondents

Original Proceeding

Brown, District Attorney, ackey, Deputy District Attorney, Joseph Mackey, Nolan L.

for Petitioner. Attorneys Gregory Walta, Colorado State Public Defender, ig L. Truman, Chief Deputy State Public Defender, man R. Mueller, Deputy State Public Defender, Norman R. Craig L. J.

Respondents. for Attorneys

and

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NO. 28049

THE PEOPLE OF THE STATE OF COLORADO ex rel. ROBERT R. GALLAGHER, JR., DISTRICT ATTORNEY FOR THE EIGHTEENTH JUDICIAL DISTRICT, STATE OF COLORADO,

Petitioner,

;

THE DISTRICT COURT, IN AND FOR THE EIGHTEENTH JUDICIAL DISTRICT, COUNTY OF ARAPAHOE, STATE OF COLORADO, and THE HONORABLE WILLIAM B. NAUGLE, ONE OF THE JUDGES THEREOF,

Respondents.

EN BANC

RULE DISCHARGED

Original Proceeding

Jr., District Attorney, Deputy District Attorney, Gallagher, Sell, Chief I James C. Sell, Я. Robert

Attorneys for Petitioner.

Kenneth K. Stuart, Jane S. Hazen, Attorneys for Respondents.

Court. the οĘ Opinion the ERICKSON delivered JUSTICE MR.

these original Three different district court judges have held that the Colorado death penalty statute, section 16-11-103, show 40 C.R.S. 1973 (1976 Supp.), is unconstitutional. sought review in rule Ø issued We three cases, has each case, rule. now discharge the proceedings. In in all

only permitted in limited C.A.R 4.1. We have elected to address the issue in these cases because of the threshold death penalty Ordinarily, an original proceeding is not available number of pending cases in the Colorado Courts. an interlocutory appeal. question relating to the application of the Interlocutory appeals are circumstances provided by C.A.R. means for obtaining as

the death penalty would have been an issue for the judge a determination of 16-11-103, C.R.S. 1973 (1976 Supp.). The facts of the In the three cases before us, it is conceded that jury to resolve under our bifurcated procedure. constitutional issues which we must resolve. particular cases are not material to the

attempt by the General Assembly to comply with the ambiguous 33 L.Ed.2d The Colorado death penalty statute represents the the United States in 428 U.S. (1976 1; Proffitt 913 49 L.Ed.2d 238, 92 S.Ct. 2726, its progeny, Gregg V. Georgia, 2950, S.Ct. 2960, 859 Supreme Court of 262, 96 S.Ct. 2909, 49 L.Ed.2d 408 U.S. Florida, 428 U.S. 242, 96 428 U.S. Georgia, directives of the (1972), and Texas, s.ct. Jurek v. 96

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Roberts v. Louisiana, Lockett s.ct. 973 (1978) subsequent pronouncements. Gardner v. Florida, 96 and S.Ct. (1976)(1976). Woodson v. North Carolina, 428 U.S. 280, 433 U.S. L.Ed.2d (1977); 633, 97 974 Georgia, Stanislaus , 98 S.Ct. 2954, 57 L.Ed.2d 393 U.S. 1197, 51 L.Ed.2d (1977); 49 431 Coker v. confusion has been magnified by (1976); S.Ct. 3001, v. Louisiana, 982 L.Ed.2d (1977); 944 U.S. 97 S.Ct. 96 L.Ed.2d 53 637 325, Harry Roberts v. Ohio, 49 428 U.S.

separate opinions, some of which are basically irreconcilable O.F. concerning the circumstances under which the death sentence elements opinion in supported confusion The Supreme Court, No unifying rationale was provided for the guidance of their result with a short per curiam opinion and nine later constitutional death penalty statute have been statute, supra, created considerable seminal number of legislative bodies of the different states. invalidating the Georgia death penalty United States Supreme Court's ď constitutionally imposed. in definition, of Georgia, Court. without clarity that Furman v. The could be

judge a particular Proffitt inability to supra; state legislature some Carolina, supra; set of principles within which to expanded on Court's Georgia, Again, the Supreme > Gregg Supreme Court a supra; Woodson v. North difficult for in Furman. See In 1976, the statute made it Florida, supra. ಹ expressed agree on Texas,

the majority and circumstances, penalty that death All some the penalty. under limitations, that death is valid of endorsed number constitutionally Ø court imposed. to subject the þe

have of the 13 Burger, statute Stevens, that Justices Justice supply to death penalty and four fit 18: Chief Powell, order to States Supreme Court have seen or jury term, 2965. Stewart, Ø last in the judge their opinion that Lockett v. Ohio, supra, at views this with Justices during differing ۲. ۲ unconstitutional Finally, previously expressed together United

offense a mitigating character for the basis 2965 ΟĘ defendant's circumstances at Q as as Id. from considering proffer death." Q the of the defendant[s] than aspect οĘ any sentence less "[P]recluded any and record that

any those cannot withstand con-Supreme Court. apparent view, are joined with his is in it States that, is unconstitutional, statute examination in the United Justices declared Colorado's death penalty four Justice Marshall, who has those death penalty statute views of stitutional the that of

> edict Lockett death the death penalty advised legislative the latest the sentence." difference between 18 "the predicate that v. Ohio other has any i, Lockett and qualitative from Court, qualitatively differs 2964. start from Supreme at the supra, that the Ohio,

⁽Marshall, 2972 at 314-74 supra, at a, supra, v. Ohio, Georgi Lockett concurring)) See Furman v concurring);

OL judge Amendments the death the other punishments requires that before to require that Fourteenth condemning another human being the Eighth and Constitution every case must: States carried out, of the United and act in penalty solemn may be jury OF

information (Emphasis supra, whose fate but have on the basis only why Texas, imposed, imposed. ore it all possible relevant in out the individual defendant who must determine." Jurek v. Texa 271 (plurality opinion, Stevens, J.). not should be that consider not be evidence is should essential allowed to sentence relevant i. why death all " [B]e about also What of

forth (plurality particujudges have sentenc the set (1976)all Colorado statute in issue was drafted before NOM of the record the 304 1973 to hear trial commandment at allow and C.R.S. circumstances supra, All-three not character jury section 16-11-103, does Carolina, constitutional the it i the the opinion was announced. cases, because to or Woodson v.North relating offender in these Stewart, J.) case, Supp.), violates the that facts individual in the Lockett held entity case. properly relevant opinion, Lockett ing the lar

distinguishing which sentence. at least two requirements before it can in from [those] the death for basis imposition of imposed "meaningful i.s it which statute must meet Ø for provide in the basis cases must it as First, serve the

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punishment Colorado on the about the limits of 20 Section II' opinion Article no Constitution. express imposed by

"objective at Woodson of or enumerate Stewar imposed supra, "action in narrowing the categories (White, supra, factors, the presence of which rationally o£ . contain sentence." 303 (plurality opinion, Texas, sentence may ever be may sentence 313 Georgia, supra; Proffitt v. Florida, at legislature statute must make Furman v. Georgia, supra, death same purpose." Jurek Stevens, J.). Ø of and the imposition Ø regularize the imposing the eng' murders for which a death at (plurality opinion, so, Carolina, supra, this for aggravating go guide, the legislature's justify process To attain serves much the 40 concurring). not." Gregg V. the serve to $_{\rm IO}$ specific North able J.) 270

defendant must be allowed to present any relevant information to why the death sentence should not be imposed upon him. above, noted requirement is that, as The second

jury Section for same convicted of question statutes provide a bifurcated proceeding the penalty. cases in which the death penalty is sought. degree murder, the proceedings, the substantive is If he proper tried. the first concerning guilt is such as evidence felony, defendant's of Colorado stage one hears class the these then of Ø

adopts enumeraaggravating Supp.] this several whether 9161)sufficient. 1973 listing opinion C.R.S. by We express no constitutionally first alternative ors. We express r Section 16-11-103(6), factors. the

existed at the time the crime was committed, it and any one of the aggravataggravating life imprisonment Any other combination defendant may present finds that none factors which the People may prove were involved in the five Section 16-11-103 provides: Supp.) lists lists eight sentence of If the jury (1976)mitigating factors on which the Section 16-11-103(6) impose the death sentence. the mitigating circumstances, 1973 Ø results in crime. C.R.S. ing circumstances, pertinent part, mission of the 16-11-103(5), of findings evidence. must

- permitted present hearing aggravat evidence (9) trials. L be perr the hear governing the any the to or forth in section or sentencing hearing οf opportunity (2) the of the shall at any the people criminal forth in subsection rules o£ received of set this defendant adequacy any existence to the mitigating factors ion (5) or (6) of t of relevant to given fair either any evidence evidence ed by eit subject the the the the section. to people and In of presented establish shall be set ลร information subsection defendant, admission "(2) rebut argument factors or t t
- sentence hearthe sentencing finding that at impose the not i.f or court shall on the defendant verdict offense: ಹ The in the results "(5) death of of
- age of eighteen; He was under the " (a)
- his conduct to constitute significantly wrong appreciate conform as uct or to co impaired to OK His capacity to prosecution; his conduct SO to the requirements but not fulness of (p) " impaired, defense
- to constitute substantial and such duress as He was under unusual or to prosecution; although not defense (C) duress,

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offense, although minor, altn e a defense his the principal in the by another, but constitute relatively d committed to Was Was as He participation so minor prosecution; " (d) which was

person." forethe Was have another he course of create the offense for which reasonably death to or would in the could not would cause, causing, conduct Не of his commission of risk that convicted " (e) grave seen

to Section 16-11-103(2), offender Supp.) so as to allow the judge or jury relevant offender speaks subsection the supra. although it precludes is hear all relevant mitigating facts about the it required by Lockett, in construe unless forth clearly Subsection (2), information "set people would have us relevant," factors as any (1976)the mitigating information so. offense, from proffering ф 1973 unable to and his "any to

the necessary information in mitigaof impediments (5)the subsection Lockett, to (2) a number o£ can read subsection requirements note We that We construe constitutional finding Again, we decline. to present a construction have us Ø of lieu people would offender the In to meet such tion. the to

449-50, consider Q such 442, United "at supports to A.2d existence jury the numerous 382 the cited above Moody, allows were in in ; > only Nothing decisions factors See Commonwealth .(5) subsection enumerated offense." Supreme Court 1977) the the First, limitation. (Pa. of States 19 time

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offender is precluded from offering in that he are all the 1. 1. except (2) (e) Thus, all, through affirmative defenses. at innocence, he is mitigating circumstances factors (5)(b) eighteen of OF his the age Second, nature maintains under any

allowed to consider circum-Court has of mitigating does not permit the Supreme jury must be stances which are among those the establish a number subsection (5) judge or attempt to the Third, declared 20

offender justificathe convicor even the alcohol, examples the a moral of and prior which Harry the youth disturbance, drugs, any provided a11 circumstances = 637. οf are of as absence at conduct such influence believed emotional supra, mitigating facts "Circumstances the of for his reasonably Louisiana, the offender, existence extreme

the police, his emotional of the crime." Gregg v. opinion) defendant the extent of h at 197 (plurality this Ny special facts about this mitigate against imposing time punishment (e.g., cooperation with supra, the at Georgia, " [A] ny

life sentence." community imposed consider mitigating and, concurring); offender would also be precluded by subsection rendered Q be Of statute his of which capital punishment should not prevents consideration the future render some service to Ø jury that he has J., to impose "factors too intangible to write into a (White, moved 222 judge or pe supra, at jury might subsection (5) proving to the might Georgia, Ø "which result, in short, could light > factors Q In

Ariz. (1964)9 366 519 393 P.2d 450 F.Supp. 150, 148, Cardwell, Colo. 155 Richmond People, see also

the death penalty may not death which provides: that contention, they could not obtain constitutionally adequate imposed in Colorado because those sentenced to 1973, C.R.S. support of Defendants also urge that Section 18-1-409, In review. jury appellate 40 point ρλ pe

jury, the right to one of the sentence, sentence any person public of sentence for a felony other it was penalty and the which the sufficiency right any felony, on which nodn the of the and i the manner in which including the suffici the propriety the the of the to the of the offender, in whi which imposed of have the information οf verdict in shall conviction is felony "Appellate review sentence Ø οĘ to convicted review $p_{\overline{\lambda}}$ and regard following a contract than a class character nodn was imposed, of When appellate interest, accuracy decided having person

Q C.R.S. reach review section 16-11-103, need not precludes unconstitutional, we 18-1-409 In view of our decision that section court. sentence by this (1976 Supp.) is question whether death

discharged ;s cause show to the rule Accordingly,

Association Sheet Headnotes 23, 1978 Colorado Bar Advance October

DISTRICT COURT PEOPLE V. 27963 No.

COURT DISTRICT BROWN V. 28017 No.

COURT DISTRICT > PEOPLE 28049 No.

Appeal) (Interlocutory Proceeding Origina1

(Mitigating Factors) Death Penalty

(Judge Death Penalty

and Jury; Facts ling Particular Offense) Offender and Concerning

(Objective Standards; Aggravating Factors) (Objective Penalty

(\$16-11-103, C.R.S. 1973 (1976 Supp.); Aggravating Factors) Penalty Death

(Mitigating Factors Construction) Penalty

(Mitigating Factors Construction) Death Penalty

1973; (§18-1-409, C.R.S Appellate Review) Death Penalty

the death because Supreme Colorado courts. issue presented in this case ating to the annline. ordinarily o the ap in the not proceeding is no In interlocutory Although an original proceeding is means for obtaining an interlocutorelected to address the issue prese e threshold question relating to the in a number of cases pending in Although elected means penalty the Court

OL the judge factor any character unconstitutional if A death penalty statute is unconstitutional injury is precluded from considering as a mitigating jury is precluded from nertaining to the defendant' c offense. the the circumstances of record or

death penalty, must information about it must determine. A judge or jury, in considering the dallowed to consider all possible relevant individual defendant whose fate it must de fate

to be constitutional, must set out judge or jury to differentiate bedeath penalty may be imposed from To this end, the legislature the crimes of A death penalty statute, to be constitutional, must objective standards to help the judge or jury to different ween those cases in which the death penalty may be impositioned in which it which it may not. To this end, the leg may set out aggravating factors which justify imposition death penalty, or it may narrow the definitions of the cr same purpose. to the which that penalty may imposed

jury court The to help the imposed. aggravating factors penalty should be in eight death out the sets determine whether \$16-11-103

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enumeration was about whether this expresséd no opinion about w constitutionally sufficient.

judge or be introintro may be in only be the information may out five mitigating factors for though any information relevant such Although any to consider. Although any concerning those factors, on the enumerated factors sets \$16-11-103 jury t duced

defendant all the mitigating facts which the leclared are constitutionally those from introducing mitigaevidence to service not factors on his own behalf, since sentenced are constitutions from introducing qo some (3) þe innocence; the future render should not defendant States Supreme Court has declared 1; and (4) prevents the defendant that he has or could in the futur if he maintains his which he introduce enumerated factors c luce all mitigating f 1) limit admissible o£ prevent virtue to introduce all mit ctors (1) limit add the offense; (2) p allow the defendant ting circumstances by community, States mandated; The show factors United

is unconstitutional, court of the court's ruling that §16-11-103 decide whether §18-1-409 precludes the sentence of death. view not a reviewing In it need

IN THE SUPREME COURT OF COLORADO

NO. 27963

1978 23 DCT Petitioner, by and through by appointed repre-OF THE DISTRICT OF THE DISTRICT GEORGE E. OF THE DISTRICT COURT OF THE THE PEOPLE OF THE STATE COLORADO, by and throutheir duly appointed rentative, FRANK G. E. DISTRICT ATTORNEY, STATE OF COLORADO, LOHR, AS ONE OF THI COURT JUDGES OF TH > COURT,

Frank G. E. Tucker, District Attorney, Robert L. Russel, District Attorney, Milton K. Blakey, Chief Deputy District Attorney,

Attorneys for Petitioner.

Kenneth Dresner, Kevin O'Reilly, Attorneys for Respondent

NO. 28017

NOLAN L. BROWN, DISTRICT ATTORNEY IN AND FOR THE FİRST JUDICIAL DISTRICT, COUNTY OF JEFFERSON, STATE OF COLORADO,

Petitioner,

>

THE DISTRICT COURT IN AND FOR THE FIRST JUDICIAL DISTRICT, STATE OF COLORADO, and THE HONORABLE MICHAEL C. VILLANO, ONE OF THE JUDGES THEREOF,

Respondents.

Original Proceeding

Nolan L. Brown, District Attorney, Joseph Mackey, Deputy District Attorney,

Attorneys for Petitioner.

Gregory Walta, Colorado State Public Defender, ig L. Truman, Chief Deputy State Public Defender, man R. Mueller, Deputy State Public Defender, Norman R. Craig L. J.

Attorneys for Respondents.

and

NO. 28049

THE PEOPLE OF THE STATE OF COLORADO ex rel. ROBERT R. GALLAGHER, JR., DISTRICT ATTORNEY FOR THE EIGHTEENTH JUDICIAL DISTRICT, STATE OF COLORADO,

Petitioner,

>

ARAPAHOE, NAUGLE, JUDICIAL COLORADO, and L. COLORADO, COLORADO, COLORADO, COLORADO, COLORADO IN AND COURT, EIGHTEENTH DISTRICT THE HONORABLE DISTRICT, OF THE OF STATE THE ONE FOR

Respondents.

EN BANC

RULE DISCHARGED

Original Proceeding

Deputy District Attorney, District Attorney, Jr., Gallagher, Sell, Chief James C. Sell, R. Robert

Attorneys for Petitioner.

Kenneth K. Stuart, Jane S. Hazen, Attorneys for Respondents.

Court. the of the Opinion JUSTICE ERICKSON delivered MR.

...

The prosecu show cause Three different district court judges have held that section 16-11-103, these rule to review in Supp.), is unconstitutional. Ø issued sought statute, case, we three cases, has now discharge the rule. penalty each Colorado death 9161) proceedings. In tion, in all C.R.S. 1973 and

limited We have elected to address the issue in these cases because of the threshold question relating to the application of the death penalty Ordinarily, an original proceeding is not available a number of pending cases in the Colorado Courts. only permitted in means for obtaining an interlocutory appeal. 4.1. Interlocutory appeals are circumstances provided by C.A.R. as

Section the death penalty would have been an issue for the judge the conceded that particular cases are not material to a determination C.R.S. 1973 (1976 Supp.). The facts of jury to resolve under our bifurcated procedure. constitutional issues which we must resolve. In the three cases before us, it is 16-11-103,

(1976); U.S. 2726, 33 L.Ed L.Ed.2d (1976 1; Proffitt v. the statute represents 428 comply with the Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 49 (1972), and its progeny, Gregg V. Georgia, the United S.Ct. 2950, U.S. 238, 92 S.Ct. 859 attempt by the General Assembly to of 262, 96 Colorado death penalty Supreme Court 2909, 49 L.Ed.2d 428 U.S. Furman v. Georgia, 408 the Jurek v. Texas, 96 S.Ct. directives of

Lockett 430 s.ct. 973 (1978) subsequent pronouncements 1993, (1977); Gardner v. Florida, and S.Ct. (1976)280, 433 U.S. , 98 S.Ct. 2954, 57 L.Ed.2d Roberts 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); U.S. U.S. 633, 97 974 (1977); Coker v. Georgia, 428 L.Ed.2d Stanislaus (1976). Woodson v. North Carolina, 49 been magnified by v. Louisiana, 431 3001, (1976); 985 S.Ct. L.Ed.2d 944 U.S. 96 L.Ed.2d S.Ct. 2861, 53 637 325, confusion has Harry Roberts v. Ohio, L.Ed.2d 49 428 U.S. 2978,

some of which are basically irreconcilable. concerning the circumstances under which the death sentence The elements The United States Supreme Court's seminal opinion in supported confusion The Supreme Court, rationale was provided for the guidance of their result with a short per curiam opinion and nine later statute have been invalidating the Georgia death penalty statute, Furman v. Georgia, supra, created considerable o£ states. number different Ø could be constitutionally imposed. in penalty definition, legislative bodies of the death of separate opinions, constitutional from that Court. without clarity

agree on a set of principles within which to judge a particular enact Jurek Texas, supra; Woodson v. North Carolina, supra; Proffitt Court expanded on some of the Again, the Supreme Court's inability statute made it difficult for a state legislature to Gregg v. Georgia, supra; In 1976, the Supreme expressed in Furman. See Florida, supra.

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the majority circumstances, and penalty that death All some the penalty. under limitations, that death is. of valid endorsed number constitutionally court d imposed. to subject the þe o.f

guidance. have 15 "reconcile Justice Burger, of Stevens, statute that Justices supply to a death penalty and four fit is: Chief Powell, ţ jury seen last term, order or Court have 2965. Stewart, in judge that at views this the supra opinion Justices Supreme during differing ì£ v. Ohio, unconstitutional their States together with Finally, previously expressed Lockett United

offense or mitigating character for the basis 2965 of Ø defendant's circumstances Ø at as as Id. considering proffer death. Q the of defendant[s] than from aspect of any less "[P]recluded any and the sentence factor, record that

conapparent Court view, withstand are joined with Supreme his is in it cannot States that, unconstitutional four Justices declared statute the United penalty who has in 1.8 those examination death statute Justice Marshall, views of Colorado's penalty stitutional the death that When οĘ

edict > death Lockett penalty legislative the latest the death sentence." between the advised is Ohio difference that other has predicate > it any Lockett and qualitative from "the Court, 2964. differs from Supreme the at start qualitatively supra, that the We bodies Ohio, from

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⁽Marshall, 2972 (Mars at 314-74 supra, at See Furman v. Georgia, supra, concurring); Lockett v. Ohio, concurring))

or judge the Eighth and Fourteenth Amendments penalty and other punishments requires that before the death the act of condemning another human being to require that United States Constitution must: carried out, case every in the solemn may be jury

information (Emphasis have but on the basis whywhose Texas, imposed, jury imposed. 271 (plurality opinion, Stevens, J.). only all possible relevant defendant > should not be impered. the Jurek that consider is individual determine." essential t sentence relevant allowed it i it the also why 18 must death before " [B]e about What at of d

(plurality circumstances of the particutrial judges have sentenc the all the Supp.), violates the constitutional commandment now set (1976)character and record of Colorado statute in issue was drafted before 304 allow the C.R.S. 1973 hear at t supra, All-three does not the jury section 16-11-103, Woodson v.North Carolina, case, because it announced. relevant facts relating to the the in these cases, individual offender or J.) opinion was properly held that Stewart, in the Lockett 1 entity case. The opinion, Lockett the lar

distinguishing sentence. at least two requirements before it can from [those] the death for "meaningful basis imposition of imposed is. it i in which statute must meet ď for provide the basis cases must it as First, serve the

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punishment the Colorado on limits 20 of the Section express no opinion about Article II, Constitution imposed by

· "objective reviewat Woodson Stewart, of OL enumerate J presence of which will death, imposed supra categories supra, rationally of contain a death sentence." 303 (plurality opinion, Texas, be legislature may sentence 313 Florida, ever the at > statute must and make Furman v. Georgia, supra, sentence may in narrowing same purpose." Jurek > Ø Stevens, J.) οŧ the Proffitt imposition regularize the for imposing factors, so, the at end, "action death supra; opinion, North Carolina, supra, this the aggravating Q To do guide, which legislature's process Georgia, justify the attain (plurality 40 concurring). serves much for is not." standards the 40 specific 5 murders serve Gregg able J.). the 270

information imposed upon him above, relevant noted not be any as allowed to present is that, death sentence should requirement defendant must be The second to why the

jury Section same At the question convicted proceeding the evidence concerning the proper penalty. sought. degree murder, substantive ı, S a bifurcated 1.5 If he death penalty tried. the proceedings, the first statutes provide is as such guilt in which the felony, defendant's of Colorado stage one cases then hears class of the first

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adopts aggravating this enumera-Supp.] g several whether t 9161opinion wheth 1973 listing C.R.S. рХ constitutionally no alternative We express r Section 16-11-103(6), express first factors.

ing circumstances, existed at the time the crime was committed, aggravateight aggravating life imprisonment. other combination οĘ present If the jury finds that none factors which the People may prove were involved in the lists five and any one of the Section 16-11-103 provides: defendant may Supp.) lists Any of findings results in a sentence of impose the death sentence. mitigating factors on which the Section 16-11-103(6) 16-11-103(5), C.R.S. 1973 (1976 the mitigating circumstances, of the crime. In pertinent part, evidence. mission must

- . be permitted the hearing aggravatopportunity to pres governing section may trials. the any Or shall be OL οf In the sentencing hearing forth the either the people any criminal received at forth in subsection rules οŧ set this of defendant fair oppo adequacy information relevant to any existence the mitigating factors tion (5) or (6) of t ubject to the evidence at any evidence l l be given fair ed by eit subject the the . the section. and to of establish presented set as people subsection defendant, shall "(2) rebut argument factors and 40 to
- sentence the sentencing hearimpose the finding that not i£ or shall defendant a verdict The court of the offense: on the in ing results "(5) of death
- He was under the age of eighteen; " (a)
- conduct constitute significantly is to constitu appreciate wrongconform his as ness of his conduct or to co impaired His capacity to Or to prosecution; SO but not fulness of impaired, defense
- to constitute substantial and although not such duress as He was under unusual or to prosecution; defense (c) duress,

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- e offense, his although defense the by another, but minor, in Ø constitute a principal relatively committed to He was Was as Or participation so minor prosecution; " (d) which was
- person. forethe Was could not reasonably have conduct in the course of t another he create or which lor would credeath to conduct in tl the offense would cause, causing, ο£ He his commission of risk that convicted " (e) grave

to Section 16-11-103(2), the offender to allow the judge or jury speaks of hear all relevant mitigating facts about the offender relevant subsection supra. relevant," clearly precludes although it is. it as required by Lockett, in construe information unless forth Subsection (2), "set (1976 Supp.) so as people would have us factors any the mitigating information offense, so. proffering to do 1973 and his unable "any

in mitigaimpediments (2)subsection allow Lockett, information to of (2) a number of can read subsection requirements the necessary We note we that construe constitutional finding Again, we decline. to present such a construction have us Ø of lieu people would offender to meet the In tion. the to

449-50 consider such 442, the numerous United "at supports jury to A.2d existence 382 allows the cited above Moody, were in in ٠. only Nothing factors decisions See Commonwealth .(5) subsection enumerated offense." Supreme Court 1977) the the First, limitation. (Pa. of whether States 19 r. ない

offender offering in he all the that are from J.F except Thus, (5)(e)precluded all, through defenses. at is circumstances innocence, he (2) (p) eighteen. affirmative factors of mitigating his age οĘ Second, nature the maintains under any

offender jury must be allowed to consider circum-Supreme Court has does not permit the mitigating o£ those the a number (2)establish are among subsection judge or attempt to stances which the Third, declared

justifica offender the Þ convic Or οĘ Harry Roberts and even alcohol, examples the believed provided a moral of of any prior circumstances which the youth disturbance, drugs, are all =. 637. ΟĖ as absence at. conduct such influence extreme emotional supra, facts "Circumstances the Of his reasonably mitigating Louisiana, the existence offender, for tion

Gregg v. opinion). emotional his defendant capital of extent (plurality his crime." about this imposing n with the police, he time of the crime 197 against facts at supra, special that mitigate punishment (e. the cooperation at Georgia, "[A]ny state

= sentence. community, imposed and, (2)host concurring); subsection rendered mitigating ಡ statute. life consideration of not be to his Ø has J., which capital punishment should to impose also be precluded by consider service intangible to write into a that he (White, some moved jury prevents 222 ٠ future render . OL pe at jury might judge subsection (5) supra, offender would the might Georgia, d to the "factors too "which from proving result, in of short, light could Gregg v. factors in In of

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X

(1964); 9 366 519 P.2d F.Supp. 393 150, 450 148, Cardwell, Colo. 155 Richmond v. People, see also 1978)

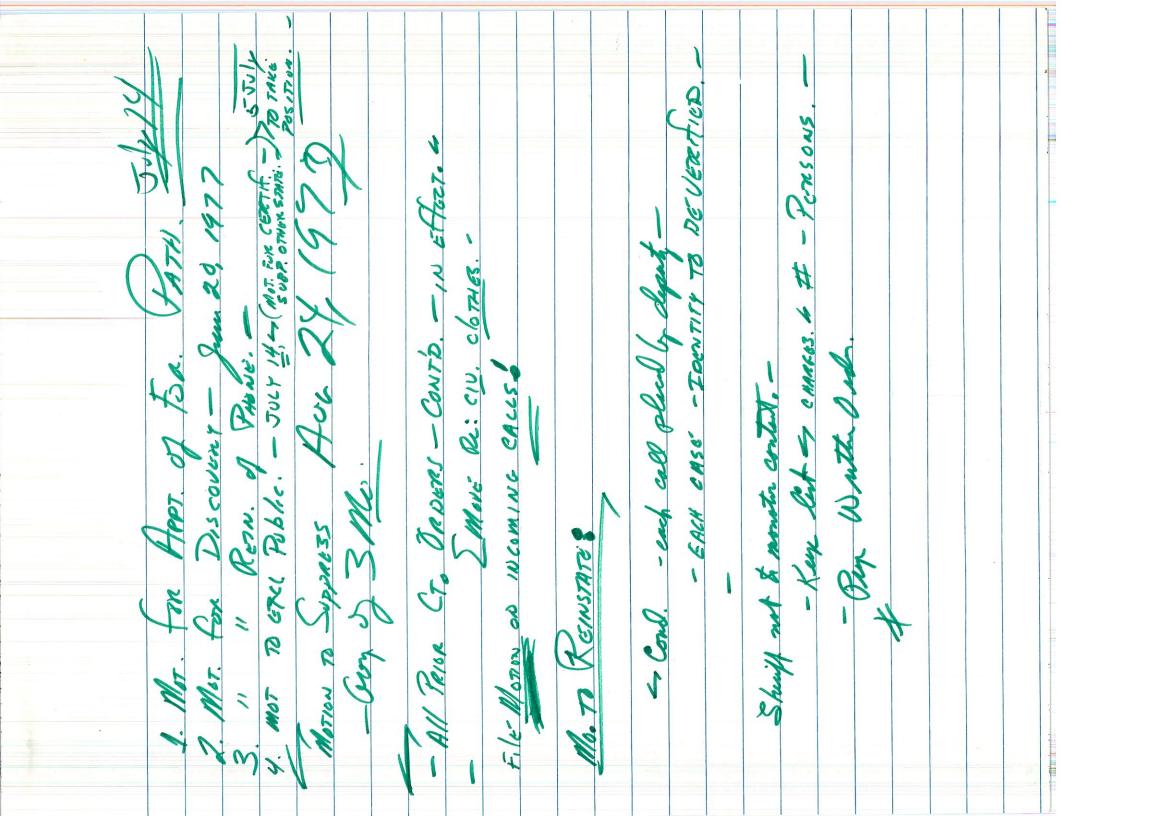
Defendants also urge that the death penalty may not Colorado because those sentenced to death which provides: constitutionally adequate contention, 1973, that C.R.S. of support could not obtain Section 18-1-409, In review. imposed in jury appellate 40 point be \mathbf{p}

sentence, sentence felony. public jury, c... other it was offense, the penalty and the the sufficiency any of sentence for a imposed upon any n of any felony, the right on which O.F and of the the offender, and manner in which the propriety the the n of any fain in which verdict of information shall have the nature including the o.Ę. conviction review o 1 felony the οĘ sentence the Ø of review to convicted the $p\lambda$ and regard "Appellate character class nodn imposed, of Ø When appellate following interest, accuracy based." decided having Was

a C.R.S section 16-11-103, need not precludes unconstitutional, we 18-1-409 In view of our decision that court. section this (1976 Supp.) is question whether sentence by death

discharged is show cause to the rule Accordingly,

26/0/21 - State o. Le 2/2/2 238 (1972 Nuch 408W.S. 3287 3.30 Simont -3282 19-3250 19-32.76 Stelle P 20 20 2356 -2527.



MAYZ DISCOURNY METION

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PITKIN

STATE OF COLORADO

Criminal Action No. C-1616

	MEMORANDUM BRIEF IN SUPPORT OF THE CONSTITUTIONALITY OF THE COLORADO DEATH	
THE PEOPLE OF THE STATE) OF COLORADO,	Plaintiff,) vs.) THEODORE R. BUNDY) Defendant.)

INTRODUCTION

H

Additionally significance because entitled recent, post the first time in recent history where the Court States requirements mandated by the Court will a defendant Supreme Court concerning capital punishment as it relates the Eighth Amendment. 16-11-103; this memorandum brief is to This brief United se. the most upheld the validity of capital punishment per sentencing litigation before the 1 Felonies. 1973, are of conviction of a Class 1 felony. on C.R.S., clause of for be placed of course, Imposition of Sentence in Class Colorado procedure to will analyzed and compared The purpose of cruel and unusual Georgia cases which, the history of emphasis the new procedural the Particular they mark after a analyze examine to the

case of People v. Wildermuth. submitted attempt to guide the trial Court in appropriately evaluating That brief was originally This brief, in no way, will attempt to answer or is the contrary, issues presented in the brief on The purposes of the People's brief, the Plaintiff in the by the Public Defender's office. address itself to the for prepared

the death penalty sentencing statutes and what that development Colorado analytical development of question. in memorandum brief has not been designed the constitutionality of the Colorado Statute the Court the an argumentative reply to the irrelevancies in the the Colorado Statute in to the constitutionality of order for the Court to do that, however, apprised of the historical and οĘ constitutionality challenge Statute. This Sentencing Defender's question. to means pe

II.

BACKGROUND:

CLAUSE CRUEL AND UNUSUAL PUNISHMENT THE DEVELOPMENT OF

Punishment Unusual and of Cruel Definition A.

unnecessary generally accepted eighth amendment's some punishment," was Wilkerson v. precise contours of the phrase were defined with proscribing The history of Supreme litigation concerning capital punishments indicates Court was "unnecessary cruelty" was the underlining controversy ಡ the punishment prohibition. an attempt was made to conceive (1879). The notion of and unusual on the clearly the cornerstone of juducial from early understanding of its scope. "cruel much However, phrase subject of 135-36 and unusual The difficulty. 130, ı.s Q cruelty itself 99 US cruel that

constitutionally the ultimate Supreme Court cases, it became apparent that involve Death As the concept "cruel and unusual" was further they did not In Re Kemmler, 136 US 436, 447 (1890). punishments Furthermore, despite not among those because ban or lingering death. the capital punishment was outside fell articulated in proscribed. sentences torture

Or acceptance inhumane oĘ considered history long was not its the punishment, it 40 due generally barbarous, οĘ

legislatively (1910)cruel characterization punishment punishment cruel graduated falsifying 349 characterized the eighth and unusual," holding that and hence Was the obsolete but death penalty had justices, a significant ns which decision was, however, States enlightened the only could the method of clause time a 217 labor 360 (Marshall, that 367. be although (1915); 408 this Eighth of but concept In v. United States, should Q because to the introduced Georgia, 217 US to the offense at hard crime several arguing Court first acts of torture, constitutional 378. 502 opinion becomes Furthermore, crime amendment which would have flexible amendment was not considered applicable excessive for the The humane justice," Weems v. U.S., 217 US the succeeding Courts mainly ns "progressive and not fastened to offense," Id., Aq uodn capital punishment context, in articulation of point where the fifteen years > 408 US 237 for punishment, it for Furman later death penalty decisions. dynamic, Johnson, invalidated excessive when compared punishment The Weems The in Weems seized concurring); "cruel are thereby recognized that not (1890). acquire meaning as public unusual. subject to modification. the cruel, as Weems, as ·| Ø notion was An advanced to the chains was held to be being concept was provided records. Kemmler, 136 US 436 Collins capital penalty justice proportioned to Court in Weems and In J., progressed ลร byinherently the eighth become cruel (Brennan unusual. this οĘ involve established unusual overlooked time. government þe years, pe The to

"evolving concept behind the Eighth Amendment. of the maturing Trop V. the who hard labor, forfeited from the affronted is not of a convicted war time deserter, The Court held abhorrent Trop ruled the Eighth Amendment in dishonorable discharge and unusual" the Rather the Amendment derives current meaning the progress existence after Weems, punishments considered The Court in and unusual punishment. years at a man's political "cruel mark fifty years of (1958).of man, the basic The meaning of the phrase standards of decency that already served three ಡ scope and received 356 US 101. 350 US 86 to denationalization reconsidered the only deprivation of a cruel society," referring pay, dignity

contemporary human knowledge is applicable eighth amendment With its decision in Robinson vs. California, 370 clause must Robinson also removed The Court ruled that incarceration excessive principal nse of Amendment. amendment noticed that the cruel and unusual punishment concerned with the to the the violation of the for ninety days for being addicted to the Supreme Court revitalized any lingering doubts that the eighth relation Fourteenth continually reviewed in light of determine its current meaning. 329 US 459 (1947). the punishment in Court was through the was excessive and thus in expounded in Weems. the States the in Weems, Resweber, nature of ,099

The next stage of development in this area witnessed quite different steadfast the does remained acquire a new meaning, issue; The Court basic the consider considerations. amendment 40 refusal eighth from prior

analysis processes sentence procedural as justifiable change. technique sentencing death amendment? The sanction a a major policy Court was using the procedural Was ultimate decision. in various i. eighth skillfully refused to Thus for the procedural defects was wholly unprecedented. public violate this preparing the per se avoiding the Court penalty Of

United technique impermissible the Federal right." this potential οĘ "an exercise of a constitutional under demanded a jury trial. (1968). several illustrations imposed example, Was 572 death penalty held unconstitutional because it 570, For 390 US Court cases. are the the accused Jackson, There upon the Act, Supreme | j. burden States

protections affirmative showing that the guilty plea itself electing insured | It became a guilty plea to the punishment at Boykin protection was when procedural protection amendment stage when a plea was entered and and voluntarily. guilty plea. jury. οĒ eighth ർ accept amendment than examining the nature judge or The ൯ trial Court to defendant entered provided intelligently eighth before a (1969). without an defendant was Further 242 case 238, for entered try the pre-trial offense greater

Court demands Court decision. clear it was to As each confrontation brought refusing the Supreme 1957. issue, further procedural found which would postpone the final in period beginning pattern was trend of byemployed the the reversed technique was although year the ulitmate deviation. twenty-three Court Thus, This evasive could be however, without

ations acceptable standards beginning consider But Court those standards differentiate Apparently Was articulate analysis. and the procedural itself impose the death sentence were process death sentence Although the future direction of matters governing punishment jury to amendment to certain. change, ď to Such be impossible procedural jury the of 402 US 183. of the eighth this void meriting a less allowed enable the Of Was of procedure in character οĘ to ı. t result significance the procedures resulting itself a part California, thought situations when adequately ď Q overshadow the punishment sentence, very much was uncertain as penalty in Was which did not. relevant the would McGautha v. i. death between because remain the ţ to ď

whether Therefore been abandoned punishments simultaneously accepted the cases certain whether considered Branch v. decisions notwithstanding, remained uncertain. οĘ been traditionally acceptance the practice of reversing death sentences had on new meaning as and invariably unusual" it v. Georgia, Jackson v. Georgia not doctrine it was and significance of the historical Court almost decided standards of "cruel established while others importantly, All of this took the punishment in issue had Thus, State Court were aspects evolving The (1972),More uncertain. several the Furman entirely. espoused. despite Ω S well the of

ц

Furman v. Georgia

Supreme before in violation the cases (1972), death that in the 238 the punishment οĒ 408 US out curiam decision carrying and unusual Georgia, and ; | cruel Furman Court held in a per imposition ď In constituted

Dershowitz twenty number Furman that that declare full Columbia seventy ロ mind commentators ΟĘ the οĘ and 2029 the Was imposition constitutionality should, in and 83 the 1971 hundred the understand οĘ 606 of Court background authorized Goldberg Unconstitutional low in At 2 District and some one CP the ď sentence the Amendments to could, onlybetter S Thus, prompted this and 9 standard, the 9 jurisdications unconstitutional on the case 0 Georgia, four Court 197 death with to states, Penalty fourteenth 0 In use as landmark and (197)rule any the Supreme S ·H 80 of > -one Itinfrequent hundred 1818-19 byead received finally Death Furman infrequency ederal H this forty se. However, the and penalty pe one the per O.f 972; that should 73, Ψ̈́ eighth なり eople decided, Was several to Declaring 1 punishment importance ath Н pressured The conclude in dropped penalty Q₁ penalty Rev de the five and the Was 26. of

considering simple incredibly involved: Ŋ. issue ono opini the The of complexity

is reversed death for and remanded 239-40. cases d limited to the the imposition alty in these car the case the h penalty in these unusual punishment fourtheenth s are r US at nent in each undisturbed cases, 408 t and the eighth and The judgment it leaves undi was granted on; "Does the c Id., death and and ar as it leav e imposed, an proceedings. question; the the cruel Certiorari amendments?" out carrying ou constitute far following further 00 in

supporte each controversy issued, before Justices were matter dissented the Five opinions οĘ the true nature opinion. four on separate view while curiam OWn the judgement nine his reflects per However, expressing the curiam than This per 80 Court. more the

other only four brief by memorandum in concurred this Marshall, of purposes Justice the of For opinion

a particular Mr. Justice Marshall Therefore Statute death penalty analyzing Justice Marshall of οĘ the Colorado language and and unusual now. The permissiblity Justice evolving standards of regardless a maturing society." important principal in time in - Wilkerson the its of Of the "majority," at one This rational allowed Mr. that which tacitly approved relevant to the case in question and question opinion ٦. اي decisions acceptable dissenting clause t 0 the the progress of oben For the most from previous unusual 1.8 a penalty which was before the Court. the its meaning today and asserted that and ignore those cruel Kemmler punishment decisions. mark рe

encouragement retribution, bargaining elimination unlikely economy since this Moreover, reasons why a legislature purposes 40 retribution included; acts, since legisl pe deterrent be sufficient for guilty pleas and citizens. extremely States pe (As will also reasons that the severe penalties. not eugenics repetitive criminal these legislative "minority" position). death penalty would not impair the can a punishment, which of ď become model in fact, murderers are ลร society amendment. sake punishment confessions and and not necessary imprisonment would the confessions, improves After reviewing the through less for often all of eighth capital prevention of Marshall punishment infra, this now is the ך. מ position in obtaining it as recidivists and that by the and punishment that death Further, society, Marshall argued accomplished guilty pleas at 355. threat of permitted ground select deterrence, in this the 408 US pe the

imprisonment, Justice Marshall punishment punishment death than life 408 US capital formulating defended the death penalty is excessive Id., legitimate purpose of actually more costly not be in unconstitutional. goals served equally well by can eugenic penalty intented any possible death execution is therefore, concluded that the never could be

jury, attorneys only "informed test often used by the Courts certain trial even the death penalty Justice conscience system penalty that average death penalty is OF would contends and that the death penalty distorts our Administration "it shocks the include if the the people the course of of the death penalty the affecting does, that Justice Marshall that people," to innocent of aware that the argues liabilities valid unless and The criminal justice, undesirably and the public during Marshall narrowed the that as Marshall Justice Marshall the The Death Penalty out discriminatory, (1952)justice of the cruel and unusual. if he were proponent a punishment is to conclude, 83, as 73, strongest informed sense of unacceptable citizens." Annals judge, executed, he would Ehrman, that the the and

amendment prohibits non-involvement punishments Burger concern prohibition to Chief were Justice death penalty. this interpretation the founding fathers excessively cruel judicial the eighth According opinion of Chief the Supreme Court decisions reflected οĘ plea for abolition of the scope whether cruel and unusual punishments. the or ď The dissenting concerned with tortuous an analysis of punishment and of examination issue of Burger's capital on the

this Memorandum) Wilkerson punishment was 130 (1878). (See Part II A of "unusual". on whether the Was it whether primarily than focused U.S.

capital punishment decisions determined by reference judicial constitutionality societal consensus to eighth refer Justice Berger counsels interpret of permissibility. that interpretations of the such a judgment is needed. the mores acknowledges that whether has been measuring an evolution in society's moral Thus the courts must οĘ Despite past indications and unusual today must be is asked to judicially manageable technique as prohibition necessarily change standards However, Chief court punishment. the Chief Justice legislatures when ď have recognized contemporary restraint when cruel capital change.

validity arbitrarily and without sensitivity to prevailing standards societal condemnation of capital punishment in > empirical proof Witherspoon It is argued that, Burger rejects the that capital punishment sufficient to overcome the presumption of legislative Brennan are no to Public opinion polls show no universal rejection of are jury The declining rate death penalty asserts there and impose death, they the failed to discharge its duty. forth by Justices Marshall there is no However, it is the duty of Justice society. the then intolerably cruel imposition does not establish of 391 US 510 (1968). and Justice Further, Chief juries disapproval by imposition standards, capital cases where The Chief considered indications of contention put infrequent juries have punishment. decency. widespread Illinois,

shown and procedural the a hybrid the procedural problem. as will be state unusual. is now however, the Of the these two divergent opinions what has evolved is much lack that what and legislatures but, only be best understood by the past historical to imposition Determination of the current view, the of the court's attention lies in displaced cruel approach and in g process Collaterally; and freakish death sentence now time, collateral has In fact, amendment back to the insure due court capricious Neither of the totally. as it is today. of the same which that the development in safeguards arbitrary, infra, not main focus sentence. Hybrid; eighth

and fourteenth then current opinion However, opponents likely to be bound to strongly reconsider subsequent capital either the majority deemed reinstatement of capital punishment a worthwhile effort, it would indicate the Furman, of Furman, the Furman to enact new the conclude to conclude that the penalty. should have found of satisfied the eighth First, announcement in response would weigh heavily on a the court's decision in Proponents in light the legislatures reconsider the issue and death penalty merited revitalization, death judicial misreading of punishment were naturally disappointed. Furman majority had forced legislators totally for two reasons. se violative of the intense. If, reinstate death sentence were not many of them felt the court would have been reasonable courts respective positions. and legislatures had After the to court to to be per immediate, mixed Reaction order ಹ the court would Of possibility legislative in amendments. decision of punishment the their the of

overruling 1.8 it unwise to intrude into predominant legislative small number it it death penalty, justified capital punishment only a felt Therefore, if reinstate the have that dissenters felt would few states; for clearly opinion would be opposed to legislatures were to dissenters decisions. four possible the the legislative Second,

Anti-Hijacking BYstate legislatures passed the death majority capital punishment provisions in unprecedented volume. the court's conviction. Q a statute providing for statutes. death. Clearly, penalty when aircraft piracy resulted in sentence \$1472(i),(n). Following Furman, the to test death enacted passed Act of 1974, 49 U.S.C. states were willing Congress itself states

aggravating a mandatory applied to argument specifically provides major crime. Thus, 1.8 a balancing of for sentence two as it once again hear statutes provide specified an aggravating-mitigating circumstances test. is of punishment circumstances before the legislation of a of statutes call for course, upon conviction court to unusual state responding of and First, the majority of set for the statute, cruel capital punishment. sentence a small number and mitigating Colorado the issue of Was stage death

III.

THE 1976 CASES:

SENTENCES DEATH NON-MANDATORY MANDATORY AND

A. MANDATORY DEATH SENTENCES

death penalty statutes were held in Woodson v. North Carolina and Louisiana's mandatory 2001, s.ct. 96 and Roberts v. Louisana, North Carolina's Both 2978,

whenever cases circumstances automatically With Justice of a mandatory First Degree imperative that in capital categories In both cases, The Louisiana statute mandated a death penalty state plan failed to provide the history of plurality identified three constitutional infirmities prior fails been to the extent that jury sentencing reflects recommendation by of a mandatory death penalty the "unduly harsh and unworkably rigid." system that The North Carolina statute imposed the death penalty in only a small percentage of impression that such penalties have crime suggests death sentence upon any defendant convicted of considered constitutionally tolerable response to Furman. five and that the offender any one of certain Supp. 1975). examined. opinion, fact they may exercise discretion of decency, a eq pluods any mercy the ď οĘ short of the eight amendment's plurality obtained for death penalties was First, οĘ convicted Stat. §14-17 (Cum. 5-4 majority held that the offense record οĘ standards standards. regardless states' use Murder. Stewart writing the character and the particular everyone conviction was contemporary First Degree sentencing. plurality's rejected as those homicide, N.C. Gen. mandatory those in which least Murder. meet at d

death sentence on inappropriate requirement guide Since among to second infirmity follows from the "objective standards be provided undirected, the defendants reasonable they would return a verdict of not guilty. guilty beyond a offenders would begin to select some of discretion would be juries unwilling to impose the considered that The theyFurman exercise

aggravated Manslaughter sentence return they for 814 Woodson crime that for t, 809 process Was when death juries requirement the evidence and infirmity Arts. evidence met on the the Murder invited instructed pe that the Ann reviewable not the its this Degree in Proc guidance, requirement would with bybasis Indeed, pe statute Crim. Second rationallyinconsistent death" case any statutory Code Was murder This Murder, 2991 Louisana of there La make sentence at every 1975) verdict without Degree unwarranted offenses and not Ct οĘ Supp. in case S Or Q regularize 9 jury First lesser decided, 9 imposing whether the (West Was the in

more "enlightened consider rises stake to offense the at procedure is. importantly the life Of sentencing ď when description most imperative מ and requiring statutory Finally constitutional of the policy" than

amendment offense respec eighth amend ne character offender particular fundamental the action of the individual of the the humanity underlying tuires consideration of record of the indivicing circumstances of the the cases 2991 humanity at capital requires and recor S.Ct "In the for 96

10 suffice capital the not dual of did Vi indi definition statute οĘ lack Louisiana narrower nvalidating the somewhat bythis provided The rom offense ٠, free

sentencing ng cts findi death mandatory verdi cts, discretion jurie οf juries, verdi in number such allow account defendants of guilty many since exercise significant history would into that verdicts return which the the 10 circumstances noted sentenced οĘ 40 Q laws Ø in guilty murderer reluctance plurality examination severe enact return have between mitigating to 100 the this automatically began an to tγ penalties, penal. After 40 distinguish refused legislatures take response death t t cases, would death and In 10

sentences, plurality enacting mandatory between relating for failing to allow mitigating dignity Furman North Furman must have done so in an attempt mandatory sentences were widely disfavored by legislatures and juries, which the plurality concluded standards. rejection of mandatory death οĘ Stewart qualitative difference sentence held the the time the court decided Finally, the Stewart plurality, of the renewed social acceptance concluded that the fundamental respect for human during factors Furman death penalty and prison sentences, the of decency societal reasoned that states the account considered before the account, eighth amendment requires S.Ct. at 2991 2992. generated by violating into standards into taken the the historical development such penalties as statute invalid of this widespread confusion Because of BYdefendant to be evolving Stewart plurality pe \$ 96 cases. death sentences. circumstances to supra, penalties after and not because underlying the to the that is imposed. capital Carolina in 1972, Woodson, respond reject light the

legislative statute in question concerning capital defer in both Woodson and jury sentencing to not plurality's conclusion in Woodson dissent, opinions society has rejected mandatory sentencing does not the problems of jury nullification was way a mandatory death penalty statute. submitted that the Colorado in his chose to the state's legislative determinations infra, statute. out that legislatures before Furman noted with its willingness in the Gregg, pointed Colorado As Justice White constitutional defects the in that the It is exists punishment. avoid is in no arguable Roberts

nullifica conclusively consideration crime be considered before sentencing the Colorado statute cannot The plurality seriously proof clear discretionary Robert the incontrovertible cruel Notwithstanding decisions positions sentence individual characteristics regularly jury a prisoner serving a life sentence was is not found one primary and uncontroverted reason. judgment that mandatory punishments were excessively the crimes a mandatory its position in this regard by noting to preferred into Roberts death Roberts, before Further, while the plurality the parameter i. t judgment death penalty societal rejection of mandatory sentencing for penalty has Finally, to take especially heinous, Thus, the mandatory a preference aggravating circumstances 3006-07 n.9. scrutinized by either the Woodson or they all. justify did not adequately deal with satisfied by a legislative criminal's character. jury that to no death sentence at imposed under mandatory statutes. can only be used as one of analytical defect, however, death imposition of the could Colorado statute requires the true that the states thus showed S.Ct. at Furman the the "unique problem" and it also certain, of death is imposed. why the requirement criminal and 96 Was 3019. Id., since and ıt that murder by the cannot for οĘ establishes a at sentencing, mitigating undermined commission may not be regarding that sentence. s.ct. tion, it the cases 96

and FLORIDA STATUTES: > SENTENCE PROFFITT NONMANDATORY DEATH GEORGIA, TEXAS >. > JUREK

murder Troy robbery and (1976)S.Ct. 2909 armed 96 charged with committing Gregg v. Georgia, In Was

or life imprisonment, circumstances the determination place before ultimately robbery stage. doubt, count. the capital separate sentencing armed of death on each jury took The jury aggravating reasonable the imposition of of the death penalty penalty stage in a bifurcated manner; counts procedure instructed aggravating circumstances. beyond a the guilty of two οĘ sentence The Georgia Q could recommend either the could not authorize second judge found, followed by of murder. ď The and sentence unless it returned trial proceeded in accordance with jury found Gregg first jury. Was counts and the guilt three ı. exist but two

Proffitt Court cases could three cases 96 the Georgia was joined by two companion cases, Texas, states which supra, Those Jurek v. capital punishment these their respective cases, In each of the Supreme Court. 2960 (1976), and sentence (1976) held that devised statutes permitting the two mandatory death muster. heard two major issues: arguments before 96 S.Ct. pass constitutional Gregg V. 2950 Florida, for and |

- eighth the the death for violation of the penalty of and Se a per fourteenth amendments, constitute Does (1)murder and of
- fourteenth if not, does the particular death penalty that and arbitrary substantial risk eighth an thus violating the in inflicted ď create be question might capricious manner, (2) penalty amendments? statute in

writing After reviewing the few cases that have involved amendment poses Stewart, claims, Justice the tests two eighth amendment distilled majority, substantial

the the Justices reached the conclusion that capital punishment acceptance; evolving which four major All-in-all, its Constitution maturing the punishment; and cited after death penalty meets concept underlying the eighth amendment." after and particular sanction must meet "the long history of judicial sentence; οĘ plurality the constitutionality rested upon Q enacted States juries 2929. οĘ dignity the progress of at the οĘ of the United statutes the decency, the violation Furman, and the continued willingness S.Ct. acceptance to served by with that the punishment the flurry of new death penalty 96 mark "accord in Id., se the purposes acceptance societal that per the its conclusion standards of penalty. the sanction: ø, it must (1)decency constitute οĘ social contemporary of considerations: proportionality οĘ and impose the the basic contemporary of history criminal finding considered. support of useful the (2)

While ramers bound to accordingly the eighth and to the supra. evolving supported regardless inextricably of "cruel and the court was most sensitive its rule of Trop, Although the plurality recognized that Thus, If the test, reference and precedent flexible interpretation It is evident that, decisis and precedent, and made test appeared punishment. as well. two-pronged in interpreted noted that history court nevertheless the sole consider historical acceptance dynamic capital to the Was unnecessary. of espousing a formal nomenclature, amendment should be approach constitutionality adhered the they standards would be stare unusual" verbally

contemporary and, not, however, neglect the test constitutionality the court did of aspect The standards

that both approval noted acceptable to expressed conclusion, the plurality that capital punishment was recently legislatures and juries had for this penalty. a basis concluded

Combining Gregg, contemporary society was not offended by capital punishment that not convinced sentence was and reliable objective index of contemporary values". concluded sanction. only the as a se. per The plurality also viewed the jury death Stewart was court capital punishment selected crimes as meriting the ultimate imposition of the the indicated that jurors acceptance, Justice of 2929. jury and legislative infrequent rejection supra, 96 S.Ct. felt it caused by atrocious that the

"totally without penelogical justification." two principle death penalty capital stated that the Gregg would invalidate is οĘ unconstitutional and deterrence serving the plurality showing that as regarded retribution The therefore, the plurality in by prospective offenders. οĘ 2930. was popularly burden S.Ct. at purposes: unnecessary and, is r. since i. 1d., 96 penalty

evidence majority at particularly punishment Furthermore, since the penalty empirical and such a itself penalty unconstitutional. Steward would not dispute that conclusion that "capital deterrent effect, outrage" retribution by the death penalty to have that assume that for some crimes Noting society's moral Gregg plurality noted did provide significant deterrence. supported nor refuted a recognized penelogical goal. death an expression of and hold the deemed safe to conduct legitimate legislatures that basis neither felt it

irrevoca the plurality asserted οf and crime severity the disporportionate to its proportionality, in "unique although always the requirement of penalty, not 1.8 murder

inherently appellate statute executive unwilling postpenalty arbitrary prohibition directed for possible challenged with is not court unwilling provided Instead, the the þλ the Court was the pre-trial "suitably determined sentencing body coupled exercised by of sources of Having found that the death penalty Ø application ا. Furman each selected defendants. of at method eighth sentencing body unless to minimize the risk S.Ct. to be examined process, in to include such made the in both its recognition that discretion is find the specific a principled 96 application Id., violated to the court occasions criminal the penalty had refused the the action." to determine whether penalty its focus its stages of the guidance to insure affording mercy unusual, numerous as and of a allow 80 capricious the to of limited discretion broaden cruel and Furman to branch on attempted severity through review. trial

determination statutes successfully met sentence The statutes called for a bifurcated Georgia, supra, addition making sentencing the petitioner the found 10 five crimes in determine devoted and The Georgia had ;| byCourt examined Georgia's new statute Legislature Gregg t t ٦. اي attacked stage is first stage of death penalty for of Furman. the lead case Georgia sentence second The alone. the requirements the The trial period. that but for murder permit the guilt. the

sentencing 2) the the (197)aggravating stage bearing brought aggravating of elects and ì£ ٦. one sentencing stage 272534 prosecutor the Q then least circumstances have The sentencing influence judgment. the 0 and might at penalty. Ann the οĘ the circumstances finds Code one At that both stage may final the mitigating death i.f trial) guilty GA. evidence given at Even authority's in the imposed bench out sentencing found aggravating 13 sentence impose found, introducing latitude set d is pe 7. T are sentencing only 2 defendant is judge, the that not statutory circumstances circumstances considerable mayin during impose authority (or penalty defense the the jury out the on i. to

- for treason, imposed Or pe penalty may be aft hijacking aircraft death οĘ The offense any case (a) the in
- judge shall instructions any mitigating the circumstances authorLinclude in ...
 Consider, any mitryring circumstances
 any of the which evidence: for authorized, include in offenses statutory aggravating be supported by the ev the authorized by law a byother t t death penalty may be s consider, or he shall ı. all for to the jury for circumstances In otherwise which may following (p)
- cti substantial armed for convi murder murder, rape, arras committed by a rd of conviction criminal of Q has offense who person who assaultive ing was record of the vith a prior rec offense or capital felony, cas committed by a serions The O.F (1)robbery, person Ø
- commission committed armed itted while commission engaged in the commented in felony, or aggravated fense of murder was continued in the cont degree rape, murder, rape first engaged the Was Of in offense The offense cor kidnapping offender was arson capital robbery, or kidnathe offender was Or OK burglary another battery, o while the (2) of
- device act of murder, knowingly created than one person lives OL the (3) The offender by his act of mula robbery, or kidnapping knowingly sat risk of death to more than one public place by means of a weapon a would normally be hazardous to the than great which armed ಡ in
- offense the other for the anyanother, committed OL money or The offender of for himself of receiving mon ry value. purpose of of of monetary monetary murder (4) OF

- ey or solicitor official district attorney or sol his oF. exercise 5) The murder of a judicial officer, distritor or former district a former district a former jud solicitor during or (2) duty
- murder person. d or directed committed mur another caused OK of murder employee he offender commit murd or The agent to (9) another an as
- it armed that Or murder, rape, outrageously in y of mind, victim. inhuman robbery or kidnapping was ov wantonly vile, horrible or i involved torture, depravity aggravated battery to the vi οĘ offense The (7)
- committed the corrections in Was duties. le offense of murder was peace officer, correct fireman while engaged official his of The any or performance employee (8) against
- committed Ø from, murder was escaped of mu who offense rson in, or confinement. in, The by a person lawful conf: (6)
- Q Or in himself with, arrest or custody was committed interfering w of confinement, avoiding, a lawful a The murder purposs preventing a law lass of lawful οĘ (10)purpose
- ing such designation. Except aircraft hijacking, the statutory aggravatinged in section 27-2534.1 warranted to be warranted in charge and s deliberation. designate in writing, signed of the jury, the aggravating circumstances which it found recommendation y instructions
 l judge to be w
 be given in cha
 for its delibe in w. the Q pe death he jury for s verdict b designate of the jury doubt. such statutory in the trial jugger shall be the jury fo enumerated or make the one reasonable treason its found, by the foreman circumstance or evidence shall shall least if i The bycircumstances οĘ imposed. determined writing death, ajudge cases o at 80 ď beyond the juc 1.8 unless The (p) in οĘ

offense statute attacked Pardon the the charged plan included of of the of authority discretion statutory first be under Board lesser willНе the action this unfettered defendants requirements. the and Q of attacked discretionary not; governor guilty W111 the which Gregg Furman defendant to which the determine particular for υĘ Petitioner the and discretion opportunities the οÉ crime to violative find in prosecutor capital pointing なり the jury the and as ď

concerning capricious when capital Stewar in than focusing of inherent on factor outlawed. ď Stewar decision more the avert conditions offender standards little 40 relevant The stages to the indirectly According order and were unrealistic sentence death penalty, discretionary byď in not offense charges guided that Furman Was 50 death court system total Ц pe held only particular these that 2937 the to the Q various commute had placing of before that contention .ct. justice nse it Furman S the the noted to use 96 byraised arbitrary on of criminal Paroles to punishment plurality, Id plurality ed attention existence how issues = use. and and the

were Q determining statutes "free the in juries that before sagreed the charged as di left capriciously" Stewart plurality next theypetitioner that and broad The arbitrarily The and sentence vague SO as

because that misinterpret Was Furman penalty presented found οĘ attack requirements were death petitioner factors the this impose that the aggravating the οĘ 40 declared flaw short refuse third the fel1 plurality could Of The statutes more juries Stewart OL Furman the one the

ed not imposed syste on isolated the y requirement caprice in that y, the isolat Q does sentences risk sentenced under substantial risk is intended to prevent caprion to inflict the penalty, the of a jury to afford mercy unconstitutional death sente the proportionality intended to prevent caprice who were create or capr on defendants that does not arbitrariness Since review is decision decision render

scope thi sentencing οf wide evidence disposed the the to and at objected quickly argument allowed plurality petitioner 1.8 more that the The argument that the trial. Finally, saying and the bγ evidence οĘ argument stage

assess 2939 at t t S.Ct. jury the Id., 96 for the better the opportunity death penalty. to impose the presented, whether

Georgia plan, the Steward plurality concluded the defendants capriciously and arbitrarily assured under death directed circumstances of stated that prompted new to do the appellate review, the those are now impose plurality a jury could no longer do what it was possible always under on cannot and ю Ю Juries concerns present "centered it Stewart nature r. freakishly; along with the by the legislative guidelines." not be that the that is, being condemned to death the attention on the Furman Furman would conclusion, οĘ plurality "wantonly and Georgia plan; concepts present This, In Stewart in their wrongdoer. the basic the decision penalty old focus were

Supreme and mitigating circum statutes circumstances some mitigating that review Florida 7-2 majority State the Florida take others into on sentencing is makes The Florida Aggravating > Georgia's the (2): Proffitt that the for the statute enumerates the aggravating judge same sentence by \$921.141 enumerates form prescribed but sentence. The Like the trial in Georgia statute in and may the jury consider, aggravating scrutiny are found in Fla. Stat. Ann. account. the specifically confined to those circumstances as review of The finding of to although there is no merely advisory in Florida, under statute. the both into jury determination of that the statute taken parallels the statutes also provides for Florida for provides be consideration. The circumstances must the Florida Florida upheld the statute stances stances Court, supra,

committed felony was committe of imprisonment. capital fe The cunder person (a)

- involving ed convict previously convice of a felony invector to the person. felony or o defendant was οf capital threat o The or another (p) use the
- great Ø created knowingly persons defendant many to The death (c) of risk
- while ed, or was an accomplice an attempt to commit, it, burglary, kidnapping te unlawful throwing, accomplice device committed destructive Was felony engaged, mission of, or ar y, rape, arson, t t piracy or the discharging of capital Tendant was commission (d) The defendant The / robbery, placing or or bomb. the any the in Or
- felony was committed for g or preventing a lawful from custody escape The capital ferse of avoiding effecting an ex purpose arrest or (e) the
- (f) The capital felony was committed for pecuniary gain.
- laws 40 any of committed ΟĘ enforcement exercise Was felony lawful the OL (g) The capital disrupt or hinder the governmental function (g) disrupt c
- especially Was felony cruel. or capital atrocious, The (h) heinous",

Stat Ø FJ in found are circumstances Mitigating

Ann. §291.141 (6):

- (a) The defendant has no significant history of prior criminal activity.
- committed influence disturbance the Was emotional under felony Was The capital defendant wa Or mental extreme the (p) while
- the the us a participant consented to the Was Or victim conduct The defendant's (\circ)
- person in accomplice another ted by anoth relatively an dant was committed (d) The defendant capital felony comminis participation we the and
- extreme substantial domination under acted The defendant under the subs person. ress or u (e) duress of anot
- OL 0 requirements conduct defendant his conduc appreciate the criminality of the cappreciate the criminality of to conform his conduct to the law was substantially impaired
- time the at defendant the of age The crime. (g) the Of

the on attack petitioner's the rejecting After

system the thoughout discretion allowing inherent for statute

impermissibly statute "inadequate guidance to those charged with the Gregg "virtually any first statute's provisions were neither argument that construed by the Florida Supreme rejected that attack in statute's death sentences." the Stewart's opinion considered the the for Stewart plurality considered vague allowing candidate imposing ٦. ب as recommending or ď same reasons pe concluded that the and have been convict to overbroad of OK the

to how to weigh the various fact finders are routinely required are satisfied when the judge argument. Once again, the sentencing is guided and channeled to impose the death penalty may be hard, it is basically The petitioner next charged that the statute discretion decision plurality opinion of Justice Stewart rejected the the against while the and circumstances. arbitrariness OL no guidance to the jury or judge as for that Furman's requirements argue found aggravating decision that responsible for that total Stewart plurality factors "eliminating mitigating and O.F imposition." same type to make. jury

to find that the process was necessarily ineffective thus opening up responsibly. the Stewart the that ٦. statute does not provide charge that State Supreme Court, they noted functions However, 2969. Court had undertaken its On the contrary, the petitioner's unobjective and unpredictable. S.Ct. at The Florida review by the 96 supra, to or arbitrary. form of refused Supreme

Jerry Jurek was convicted state statute by the same attempting and of committing supra. The Court upheld a third 7-2 margin in Jurek v. Texas, course the in of murder

child prison that murder the in which ten-year-old committed from include act and and institution for officers the significantly felonies, murder situations Was murders ൻ nodn significance peace οĘ penal particular categories rape remuneration, The ΟĒ differs ർ from murders forceful imposed. ΟĒ scheme out escape the and knowing discussed. for carrying and be limits statutory an may murders kidnapping during severely sentence of two intentional course employees, Texas committed previous commit death Texa The the

deliberately questions sentence jury beyond result sentencing require threat have the may proved would ď defendant specified jury if questions continuing acted no, which Texas However, the has death be defendant to for provocation The the state three the follows: that Ø questions Ø of call constitute imposed. Essentially, imposed. the the expectation conduct the procedure that t as anythe whether i.s answer reads be to would the finds of sentence imprisonment will response any entirety reasonable whether statutory questions. the jury defendant consider: 10 a reasonable doubt death the answer in and its The the ΤĘ three unreasonable to the the ety; in the jury with existed. is yes, of life whether soci statute answer finds and the to

g proceeding shall be authori ured in United state defendant the рe court evidence secured the Unit imprisonment. This that shall as The finding that apital offense, the rapital offense, the rate sentencing Frankant sl the to soon sentence. proceeding, to any matter for evidence tution of counsel in as relevant to sentenc shall not be constru ction of any evidenc f the Constitution of content the defenct of life imples conducted trial jury as the process. ΟĘ capital of separate his State defendant or ed to present e of death. whether as death the ď shall In shall the presented introduction Q Upon ď conduct determine Of before of to violation of States or of practicable. deems proceeding subsection is guilty shall cond sentenced permitted sentence the pe court court may the and to

- the presentation shall submit the the jury: court conclusion the the to evidence, ing issues ou following (p) the
- defendant reasonable deceased Was the deceased with the rest conduct of the d that caused the death of the committed deliberately and w committed that the death o result; would another
- that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- whether the to evidence, who response deceased. of the defendant in unreasonable in it any f raised of the A (3) if conduct o deceased was provocation, the
- οĘ issue doubt, and al verdict submitted ach special state must prove nd a reasonable d return a special issue each state l beyond shall re "no" on The submitted the jury 'yes" or (C the
- (d) The court shall charge the jury that:
- "yes" issue and any unanimously; answer not it may agrees (1; s it unless
- (2) it may not answer any issue "no" unless 10 or more jurors agree.
- this defendant defendant affirmative this negative Department under the the the jury returns a negaissue submitted under sentence sentence an returns an submitted the Texas the jury ret ach issue sub court shall f the jury re the court in each finding on any i article, the couto confinement for the c ΗE Corrections on finding on article, to death. (e)
- sentence S days case an of conviction and senter t to automatic review Appeals within 60 days the sentencing court less time is extended ar Appeals. cause Criminal rules other ρχ days r good of Cri all ot with Criminal 30 for period not to exceed 3(Criminal Appeals for a review by the Court of the Court of the Court of the Appeals in accordance of the Court Court The judgment of con shall be subject to court of Criminal Appertification by the second unless to of Court Line record Court of Crincerification the bySuch r shall entire be promulgated additional Court shall (f) death shown. Appeals the of dea by the after the and of

Court the byupheld also Was scheme

circum narrowing that be could Justice Stewart noted aggravating-mitigating bypenalty served death Was purpose the which opinion, the identical adopt for plurality crime not an did οĘ approach, the Texas categories announcing although stances the

limited circumstances imposed deal Furman death that mitigating circumstances must also be taken three post-conviction questions which under eliminating carefully specifically the because the Stewart plurality pe affirmatively before punishment can the aggravating plurality held that the plan while determination of not the Texas the jury does statutory capital statute with mitigating circumstances, guide and channel validate answer in the as which the can be imposed. same purpose Stewart jury must discretion alone would not Since for murder The account. examined the is, to statute the serves the arbitrary of mandates sentence imposed. that This

interpretation constitutional question Texas Criminal the jury's attention he may be Of concluded consistent consistent with the requirements second of Court's therefore circumstances that Appeals had indiciated in its decision the interpret the plurality even, and that Texas 1.8 as to allow a defendant to bring to found Stewart death penalty and the for rational, plurality that it would accepting relevant mitigating the the second question, The Stewart 2958. ٦. Thus, It provides case Texas statute the at οĘ show. S.Ct. petitioner's imposition of whatever able to 96 Furman. Court SO

that Texas procedure considerations was held the consider mitigating circumstances. ٦. ا punishment in aiding the jury's determination of case This evidence particular constitutional that the the capital complied with this new demand. introduce this concluded to significance to allowed to Stewart stated that introduced plurality to jury defendant was concept was The circumstances the the adequately question, required Justice

despite the absence of explicit reference to mitigating S.Ct. 96 Id., circumstances in the statutes.

these decisions that McGautha either future. cases is now obsolete and once again the death sentence is Jackson line of certiorari on i. through consistent immediate government. intervene in legislative determinations, The impact of procedural indicate given the reluctance accomplished to rule Rather, the highly unlikely that the Court will grant in the an otherwise οf These three landmark cases The court did not refuse it did not use a legislative branch punishment per se sentencing alternative. must be in death. anomaly sought significant because, sentence of per se and an capital executive or relief not Was Ø any cases. Court to issue of viable penalty reverse

ΔI

sed. 1973, et. C.R.S., GEORGIA, CONSTITUTIONALITY OF > GREGG AFTER THE

and historical statute important The Public Defender's States against Colorado these cases, an incorrect analysis and reading of these key United analyze Colorado sentencing correct constitutional supra, is an depends Wildermuth attacks the Colorado statute the the context sought to reason Gregg, Proffitt, and Jurek, a misconstruction of constitutional A misconstruction of The the above-cited cases. This Memorandum Brief has against question of whether the degree of detail precision. the is upon examining that statute a misinterpretation of 1973, 16-11-103, fatal as cases. Furman, progression of Court equally cases in one; the Brief in C.R.S., Supreme

Defender's Court the ρλ Supreme supra, argued the Public is submitted, were rejected by the issues Jurek, οf most and those Proffitt, In fact, of reiterations Petitioners in Gregg, statute in q<mark>u</mark>estion. those cases are which, it in

is an alternative find it necessary or appropriate the minimum constituti have been previously litigated order to determination et. more Gregg, specified issues i.s requirements necessary in statute when death statutes must possess in ď 1.8 issues these reasons, an articulation of however, litigated on This brief does not either no longer relevant or What is appropriate, arguments state sentencing already death constitutional Court than the reargue the requirements uphold the of the supra.

the defendant eighth amendment has proscribed barbarious opportunity construct sentencing standards which prohibit judges and juries from arbitrarily The sentencing authorities well as those which are dispro bifurcated procedure circumstances assuring that a jury is given adequate the death circumstances approach fills include. Ct. The the mandatory, it ςς • The when provided with adequate information. characteristics of 96 determining which circumstances to Naturally, Gregg V. Georgia, reduced the specific capriciously imposing the death penalty. eighth legislatures must is not ď arbitrary sentences is for committed. the providing procedure consider receive careful consideration. οĘ and the individual inhumane punishments as aggravating-mitigating A knowledge information. crime should be directed to Basically, Court intimated that Although this best method of Historically, the the to and imposing jury are requirement. will aid in portionate crime guidance and the

aggravating Which Georgia comports with crime Coker v. reasons and the to mitigating the 1973, 16-11-103, proportional these terms. explaining Therefore, the humane and justified in in of these requirements. C.R.S., aid circumstances should 3249. death sentence is perpetrated. penalty must be U.S.L.W. Was

similar Jurek comparison of the Colorado mitigatingthese statute although capricious quite on One; a plain reading comparison of and procedures Proffitt, procedure "ultimate resolution." the similarities are obvious intent in Colorado's 1.8 differing, this indicates that Colorado's limits which prevent an arbitrary or factual like those statutes in <u>Gregg</u>, a sentencing take two factors with the ď 40 οĘ in is not necessary resolution applicable closely drawn Two, the legislative to provide application of death as the aggravating factor statute ď step-by-step; a meaningful fact, and Texas, That similarity is is, parallel, ways: exactly as were it shows That People feel statutes Florida face); allows within these

Rather, the constitutional requirements circumstances given to the reason the jury questions, it by and þе judge specific sentencing process, aggravated and mitigating |: statutes The statute clearly must allow the Gregg to the the answers i.s imposed. that consideration essential are met if, somewhere in the pe jury instruction, death penalty should not types. the due is not consider both means, enumerate both 2956. H. ب at other way of

imposition the approach arbitrary. that Or assuring adopted freakish has strenuously to not be conrse, penalty will οĘ Colorado, conforms most death which

Colorado one and the factor least Proffitt Of the mitigating comparison Memorandum) οĘ prove Gregg, constitutionality to the Ø in this prosecutor a11 issue factors of disprove М be at III those the the Section and ally, supports require with factor potenti factors (See t t supra, Ø aggravating may procedure Colorado Jurek, which

tγ litigating sed eighth punishments penal Ø abuse amendment, et. death legislative the deal primary Appropriately Gregg, peen and evils possibi the barbarious adequately statutes adequately in eighth two οĘ the the requirements the imposition prevents to note The either and mind, minimizes rulings. which has curb. inhumane well in in Court, question formulated inconsistent constitutional considerations Court to it i generally is. the designed prohibits though, i. in Surpreme interpreted by context, strategy must be statute More and ı. Additionally the 4 these -H irrational recent amendment Colorado Clearly, judicial to meet supra With as

importance οĘ review noteworthy judicial οĘ meaningful Felonies? i.s issue Н for ass additional provide Cl in sentences One Colorado death Does

Constitution Supreme Colorado Colorado the the O.F of jurisidiction 2 Section part: VI, in Appellate reads, Article Ιţ the Court. fixes

- e Supreme the District City and le Court of th shall be allowed I have such other provided by law l judgment of the Court of the Cirol the Juvenile Obenver shall be art shall have Su by the ent of t review be Denver mayof Den Court and Appellate revery final as Denver, review added). County Supreme the ts, Appellate (emphasis and Of the County cityand
- sentencing H ass CJ Ø α for of guilt provides οĘ 16-11-103, conviction nodn 1973, held C.R.S., be to hearing

The either Ct. imprisonment. Distri Court Court, the Supreme the of life judgment bythe finalized OK $p_{\overline{\lambda}}$ such death Q becomes as ı. S sentence of reviewable procedure therefore, ಹ The 18 imposing and sentence, Felony Court by

reasonable People grounds ìf act, statut that 24. Ø with show .200 44 beyond Colo In rule Д that to stent 177 2 unconstitutional 1: defendant applied \vdash constitutional, Consi that 292 Praute, one and 0100 1040. the > ลร accepted 61 On People P2d characterized statute People, 1.8 as 496 burden construed generally construed. Colorado > (1972)heavy Cavanaugh Colo. been be the 083 K 80 the can has S pe -1 hold 2g statute Howe burden burden shal1 to

reflects reviewability Colorado algener evidence several its judgment review the apply the and The judgment One; in Clearly 4 on of to sentencing hearing reflected Court's portion ability standard law. chose right that Colorado. appellate 4 not and guil the that Supreme which same are need law has toward does defendant the in OF burden Court and however, Colorado the under it sentence matter directed criminal as the review Supreme any just hearing the d l (q) Court, meet οĘ as Felony merits 40 may Colorado 4 basis the rights reversed, 40 Rules This analysis sentencing Court certainly Н insufficient the evidentiary ass appellate Appellate of on CISupreme pe areas above held then can of

entry thereof ผู court ď notice O.É treated In judgment announcement cler but before dayal by trial of K Cases Criminal Cases tice of appeal iled in the tri fter the entry pealed from. A order but beer shall be the O.F on arrest he notice of be filed in ays after the rappealed after the after the after the filed in after the filed in after the filed in after the filed in after the filed in after the filed in the and or order appearediled after the sentence, or order server entry criminal case the reference case the reference shall be within thirty days judgment or order of appeal filed aft decision, sentence, days motion such e judgment after such timely the of the filed If a t

section neglect the and order be days be of than notice authorized thirty for ground of newly similarly extend pe shall be thirty da or order conviction may fter the entry motion been made, within When of this s criminal Or shall οĘ other A motion without mot or filing a exceed excusable uch appeals shat.

t. A judgment meaning of thi after the motion is made wi entry of the judgment. The state or people is au the notice of appeal shall court within thin ntry of the judgment or on. All such appeal judgment ground after or to has motion. showing of emay, before for Of in t rof not ered evidence
a judgment of
thirty days a section or any a period no expiration this section the evidence will time with entered on within the take.

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the state c
the notic denying the the trial discovered discovered expired, from. A Supreme ď court led in centered wrahen it is Upon a is extend ď for byfrom prescribed docket. U appeal appealed filed in time has notice, appeal taken w for newly days is (a)

right any This οĘ the Of convicted stayed upon (a)(1)matter 16-12-101 ٦. σl defendant ∞ as A.R. be remedie must 1973, C $an \lambda$ death appeal C.R.S., appellate rule of οĘ this in sentence notice codified has Under felony ď d of fact, 1.8 filing class rule In

Two; Colorado Appellate Rules, 4 (c)(1):

- (c) Appellate Review of Sentences.
- conviction sentence imposed right/ and offender nature propriety the nature sufficiency n which the When Was ď f Review. Who on following he sentence washall have the added) the to the on (emphasis O.F est, and the information o regard the person shate review of having regard any person which the character OF Availability offense, the chappublic interest, felony in w Court, the gappellate re based Sentence, hav nodn the Was οĘ imposed accuracy (I)any the one the the the is of by to

any of. to conviction sentence right the the Npon have οĘ shall propriety mandatory. convicted the i. οĘ rule person review This the appellate felony

Three; C.R.S., 1973, 18-1-410:

d υĘ remedy. appea byno Postconviction the fact that r sought Was crime Notwithstanding 18-1-410. of conviction

thereon: that postconviction review must, allege one or more of the nbou crime the OL review. hearing affirmed make therefor, ο£ to for postconviction conviction was al person convicted ർ right justify prescribed O.E person matter application for point good faith, all time οĘ Ø every applications as judgment appeal, e entitled

- Or obtained States the state; in violation of the of the United States of this state Was conviction laws in imposed in or laws Or the or sentence impos constitution or the constitution That (a)
- the t was convicted violation of the protected; the the Or that Was States nduct for which the applicant wosecuted is constitutionally prospected is without jurisdiction over the eapplicant or the court rendering the applicant verthat is in victory the United State, or this state, or ch the applican the of th of th which That t statute under a stack constitution c constitution c prosecuted <u>අ</u>
- judgment person of person matter; rendering the was
- otherwise authorized exceeded 1.8 law, or is e sentence imposed (d) That the sentence maximum authorized by lain accordance with the s L in accordance v the not by
- al diligence, ned of by of materi urt or jury conviction heard, learned justice; t t ot theretofore presented and hy the exercise of reasonable dt have been known to or learnendant or his attorney prior to on of the issues to the court attorney prior to evidence ented and the vacation of interest of exists That there which requires sentence in the the defendant or h submission of the sentence not , by not (e) facts, which, could n and
- sufficient applicant's application the in been the he law, applied or sentence, allowing justice retroactive a ged legal standard; applied to the has bed to there That change in the laconviction or so interest of justof the changed $\widehat{\exists}$ (Ŧ)
- therefor affirme οĘ prior parahas not sought appeal the time prescribed t conviction as been af ch in lif, this sought forth set forth to f pursuant has not so the time p ground not be may not relief raph (f), a person h conviction within t The judgment paragraph (f) to filing for graph (f), a p a conviction w (II)appeal nodn Or
- properly upon a grounds otherwise collateral attack Or judgment; Any for (g) the basis criminal j
- has been unlawful conditional he sentence imposed that there has been ion, at prob parole the or That of fully served revocation or (h) release fully

of imple Colorado rule iight to postconviction prescribed by the rule of the state the Procedures to of the right all be as presc ion of the shall be a court supreme (2)
mentation (remedy shother)

nodn review affirmed οĘ right Was second judgment Q has his defendant that fact every the notwithstanding Here, appeal direct

Procedure Criminal o.F Rules Colorado inally; .. (a)

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ence reviewing within provided judgment days In 120 at sentence imposed Illegal Sentence.
n illegal sentence t
t a sentence imposed
thin the time provice a judgment reduce a se OL within the provided or pursuant 120 review, appeal, rider or the Q sentence ď within of e is imposed, or to by the court of upon affirmance order reduce bγ LITECT OF UPHOLDING A
The court may not r
an appellate conrector as the probation within reduction of of an correct of e court may correct or y time and may correct an illegal manner w reduce a sensent sent sent receipt by rissued upon or dismissal o ys after entry or appellate court the effect of a Of revocation the remittitur judgment or 120 days aft or ed by 4 (c) The conviction. for court may reviewed A.R. having herein court in U

Supre People collateral 27715 concerning that Colorado The No. (a) motion Felony, has S.Ct. the (a) position 35 before People, 35 C.R.C.P. ർ no presently under Class take > to Ferrel Q arguable, brief, review remedies pursuant οf is. οĘ convicted i, memorandum case as is. argument It the defendant, in Ø Court this

mitigating statutory review reviewable received will the merits under order ٦. the prosecution Ø OL procedure thi important evidence is in aggravating Clearly What phase) on trial that bifurcated are reason: substantive too to new the rights often attention phase one Q οf the contemplate Indeed, appellate more for (or "sentencing" οĘ OL 16-11-103, jury's phase phase one Felony above not "guilt" "guilt" disprove the the does 1973, The Н refer Class under the the procedure OL merely every C.R.S under under prove able

"sentencing" the of right in the standards as of duplicated reviewable appellate (c) refered to or C.A.R. 4 same evidence is the obviously 4 (b); L S If that "guilt" phase and C.A.R. then factors. apply.

responsibly by utilizing those appellate procedures alternative is available sentence B of this Memorandum) coupled with the postconviction remedies in C.R.S., 18-1-410 and precisely delineated review undertaken Colorado Appellate the general appellate review of right sed. this rule appellate review As Proffitt (a)(1)Florida refused convicted constitutional ments of appellate review as enumerated in Gregg, et. Indeed, and upheld Q Or Therefore, this court is left with several death. supra. brief; appellate review of ineffective Court had same process O F (b), 8.1 therefore, death sentence imposed under the statute. a Class 1 Felony and sentenced to that the Rules review, its death sentences in Proffitt, the Wildermuth of this Memorandum). provided for a defendant in Florida thus, insuring meaningful 4 Part III Colorado 1 Felony. Supreme C.R.S., 1973, 16-12-101, satisfies the Colorado Appellate Rules does not, however, and, form for was necessarily after noting that the of Florida did not have a (See Colorado that was available 18-1-409 excludes direct in that the Florida in Class distinct review seems clear, therefore, Defender points out 2969 В Supreme Court, however, jury for a III process and S.Ct. at sentence not prescribe a that are part (a) and, the in fact, functions (c)(1)(See Q. reflected in procedure of Procedure 35 96 Colorado of illegal imposed by that available positions Proffitt, Florida, supra. 4 state and, Rule its It

constitutional sufficient satisfy or defendant context at 18-1-409, of appellate requirements become, standard (a) People' R.S for the the 35 clear C to basis into "meaningful must the 40 (1)C.R.C.P supra q applied Ø one available (a) the placed ٠, Either the hearing however, . show 8.1 and constitute sed as satisfy proportions, which, οĘ A.R 18-1-410 2, companion cases, et. sentencing procedures appeal requirements This, Section C to Gregg, (c); rights on in order 1973, supra. and in reviewable Article VI, and appellate above required (p) C.R.S., constitutional trial its review sed. tutional 4 The and each C.A.R. point, general of et. -101; as appellate of Gregg reading review" Gregg, consti need: under 16-12 some the

Q arbitrariness Yet, within death sentencing the reached hand perogati account application the death offense which fell one Gregg plurality require death penalty of but the which the constitutional into the supra fear keep on other, its standard of cannot take penalty the sed., to that circumstances the t t desire without statute Colorado the sentencers 80 et. on these sentencing mandatory guided penalty Georgia, analysis, the viable punishment sfies A The combined the 80 both. ď permits discretionary sati capital οĘ þe > and possible. final of parameters discretion must Gregg question crime which i. elements the В in unless Was as the In conclusion ď required ือ ın result completely uniform outer of combines penalty statute penalty nature this as

Respectfully submitted,

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